

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6
7 SEARS HOLDINGS CORPORATION,

8
9 Debtor.

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11
12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15
16 April 18, 2019

17 10:46 AM

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19
20
21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: UNKNOWN

1 HEARING re Debtors Motion to (A) Enforce Asset Purchase
2 Agreement and Automatic Stay Against Transform Holdco LLC
3 and (B) Compel Turnover of Estate Property, and (II)
4 Response to Transform Holdco LLCs Motion to Assign Matter to
5 Mediation (related document(s)2766) (document #2796)

6
7 HEARING re Motion to Compel Payment of Post-Petition Rent
8 and Related Lease Obligations Pursuant to 11 U.S.C. §§
9 105(a), 363(e), 365(d)(3) and 503(b)(1)(A) and to Pay All
10 Subsequent Amounts Owed On a Timely Basis filed by Robert L.
11 LeHane on behalf of Trustees of the Estate of Bernice Pauahi
12 Bishop (document #2414)

13
14 HEARING re Initial Supplemental Brief in Response to
15 Debtors' Motion to (A) Enforce Asset Purchase Agreement and
16 Automatic Stay Against Transform Holdco LLC and (B) Compel
17 Turnover of Estate Property, dated April 2, 2019 (REDACTED)
18 (related document(s)2796) filed by Abena Mainoo on behalf of
19 Transform Holdco LLC (document #3011)

20
21 HEARING re Debtors' Supplemental Memorandum of Law in
22 Further Support of Their Motion to Enforce the Automatic
23 Stay (related document(s)2796, 2864) (document #3079)

24
25

1 HEARING re Transform Holdco LLC's Supplemental Reply Brief
2 in Response to Debtors' Motion (A) Enforce Asset Purchase
3 Agreement and Automatic Stay Against Transform Holdco LLC
4 and (B) Compel Turnover of Estate Property

5 [REDACTED] (related document(s)3079, 2796) filed by Abena
6 Mainoo on behalf of Transform Holdco LLC. (document #3156)

7
8 HEARING re Transform Holdco LLC's Response to Debtors' (I)
9 Motion to (A) Enforce Asset Purchase Agreement and Automatic
10 Stay Against Transform Holdco LLC and (B) Compel Turnover of
11 Estate Property and Reply in Further Support of Its Motion
12 to Assign Matter to Mediation (related document(s)2766,
13 2796) filed by Abena Mainoo on behalf of Transform Holdco
14 LLC. (document #2864)

15
16 HEARING re Joinder of the Official Committee of Unsecured
17 Creditors to Debtors (I) Motion to (A) Enforce Asset
18 Purchase Agreement and Automatic Stay Against Transform
19 Holdco LLC and (B) Compel Turnover of Estate Property, and
20 (II) Response to Transform Holdco LLC's Motion to Assign
21 Matter to Mediation (related document(s)2796) filed by Ira
22 S. Dizengoff on behalf of Official Committee of Unsecured
23 Creditors of Sears Holdings Corporation, et al. (document
24 #2808)

25

1 HEARING re Motion of Wilmington Trust, National Association,
2 as Indenture Trustee and Collateral Agent to Prohibit or
3 Condition Debtors' Continued Use of Collateral, Including
4 Cash Collateral filed by Edward M. Fox on behalf of
5 Wilmington Trust, National Association (document #3050)
6
7 HEARING re Objection / Joinder of the Official Committee of
8 Unsecured Creditors to Debtors' Objection to Motion of
9 Wilmington Trust, National Association, as Indenture Trustee
10 and Collateral Agent, to Prohibit or Condition Debtors'
11 Continued Use of Collateral, Including Cash Collateral
12 (related document(s)3198)(document #3210)
13
14 HEARING re Motion of Debtors to Compel Turnover of Estate
15 Property filed by Sunny Singh on behalf of Sears Holdings
16 Corporation (document #2715)
17
18 HEARING re Community Unit School District 300's (I)
19 Objection to Debtors' Motion to Compel Turnover of Estate
20 Property and (II) Reply to Debtors' Objection to Motion of
21 Community Unit School District 300 for Relief From the
22 Automatic Stay or, in the Alternative, Abstention (Related
23 Documents 652, 1280, 2715 and 2717) (related
24 document(s)2715, 652) filed by Allen G. Kadish on behalf of
25 Community Unit School District 300 (document #2996)

1 HEARING re Supplemental Objection to Debtors' Motion to
2 Compel Turnover of Estate Property (related document(s)2996,
3 2715) filed by Allen G. Kadish on behalf of Community Unit
4 School District 300 (document #3247)

5

6 HEARING re Motion of Community Unit School District 300 for
7 Relief from the Automatic Stay (document #652)

8

9 HEARING re Debtors' Objection (document #1280)

10

11 HEARING re Motion of Community Unit School District 300 for
12 Relief From the Automatic Stay or, in the Alternative, for
13 Abstention filed by Allen G. Kadish on behalf of Community
14 Unit School District 300 (document #652)

15

16 HEARING re Motion to Compel Payment of Post-Petition Rent
17 and Related Lease Obligations Pursuant to 11 U.S.C. §§
18 105(a), 363(e), 365(d)(3) and 503(b)(1)(A) and to Pay All
19 Subsequent Amounts Owed On a Timely Basis filed by Robert L.
20 LeHane on behalf of Trustees of the Estate of Bernice Pauahi
21 Bishop (document #2414)

22

23 HEARING re Objection of Transform Holdco (document #2832)

24

25

1 HEARING re Debtors' Response and Reservation of Rights (
2 document #3169)

3

4 HEARING re Response of Trustees of the Estate of Bernice
5 Pauahi Bishop (document #2922)

6

7 HEARING re Motion to Compel Debtor in Possession to Assume
8 and Assign, Or, Alternatively, to Reject, Unexpired Lease on
9 Real Property (Sears Contract No. S8729-73-A) by Dedeaux
10 Inland Empire Properties filed by William P Fennell on
11 behalf of Dart Warehouse Corporation (document #2980)

12

13 HEARING re Debtors' Objection (document #3168)

14

15 HEARING re Motion for Payment of Administrative Expenses
16 Pursuant To 11 U.S.C. §503(a), 503 (b)(1)(A), and 507(a)(2)
17 for Mauldin At Butler LLC, Other Professional, period:
18 1/1/2018 to 12/31/2018, fee:\$, expenses: \$88,660.08. filed
19 by Mauldin At Butler LLC (document #2690)

20

21 HEARING re Debtors' Objection (document #3163)

22

23 HEARING re Reply of Mauldin at Butler, LLC (document #3225)

24

25

1 HEARING re Motion of Debtors for Entry of an Order
2 Authorizing and Approving Procedures for Settling De Minimis
3 Affirmative Claims and Causes of Action of the Debtors (
4 document #3031)

5

6 HEARING re Limited Objection of Wilmington Trust, National
7 Association (document #3144)

8

9 HEARING re Motion for Payment of Administrative Expenses
10 Motion of Winners Industry Co., Ltd. for Allowance and
11 Payment of Administrative Expense Claims. filed by Winners
12 Industry Co., Ltd. (document #1386)

13

14 HEARING re Notice of Agenda of Matters Scheduled for Hearing
15 on April 18, 2019 at 10:00 a.m.

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17 HEARING re Debtors' Objection (document #2839)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. In re Sears
3 Holdings Corporation et al?

4 MR. SCHROCK: Good morning, Your Honor. Ray
5 Schrock, Weil Gotshal on behalf of the Debtors. Your Honor,
6 before we get started and move into the main agenda, I just
7 had a quick update for the Court and parties in interest and
8 some recent case developments.

9 THE COURT: Okay.

10 MR. SCHROCK: First, Your Honor, I want to report
11 that the Debtors have selected two firms in consultation
12 with the Creditors' Committee to pursue preference
13 recoveries. This is following a competitive process, you
14 know, working with the parties. And we think what we have
15 are market leading recovery -- or market leading pricing for
16 contingency fees on those, so the ASK firm and
17 Acumen/(indiscernible) that have been selected by the estate
18 to pursue those recoveries. And I believe, you know, the
19 Committee and the Debtors are both supportive of those.

20 THE COURT: And these are basically preference
21 claims?

22 MR. SCHROCK: These are just preference claims,
23 Your Honor.

24 THE COURT: Okay.

25 MR. SCHROCK: And you know, there's -- there were

1 roughly \$3.8 billion of transfers in the 90 days before the
2 cases were commenced. When you take out some of the low-
3 hanging fruit, the exclusions, you know, it's roughly \$1.9
4 billion. And you know, we do have some estimates that you
5 know, we believe will be recoverable, but we do think that
6 those firms getting started, getting demand letters out soon
7 and starting to get that process moving is crucial to, you
8 know, the plan process and driving the estate's recoveries.

9 THE COURT: Okay. Hopefully that process won't be
10 finished by the time our plan is confirmed in the case, so
11 obviously, I would hope you -- I would consider how to
12 integrate that into a plan --

13 MR. SCHROCK: Yeah.

14 THE COURT: -- a post-effective date plan
15 structure.

16 MR. SCHROCK: We are, Your Honor, we would
17 contemplate that those firms would ultimately be retained by
18 a post-consummation trust born under the Chapter 11 plan.
19 And you know, those would continue also to work of course
20 with chambers so that we don't necessarily cause too much
21 trauma to your docket as well as we would put that protocol
22 together.

23 THE COURT: Okay. Well, and that's the other
24 point I just wanted to raise. I don't know how many
25 potential defendants there are, but clearly, in other cases,

1 the adoption of sort of the overall procedures for dealing
2 with these types of claims has been successful, sort of
3 along the lines of what you've done with personal injury
4 claims in other contexts, so hopefully -- I hope they will
5 be considering that as a possibility, at least.

6 MR. SCHROCK: We are, Your Honor, and we'll work
7 on the protocol and hope to get it through with the
8 Committee and get it in front of Your Honor, the Crothers
9 Committee that is, and get it in front of Your Honor here in
10 short order.

11 THE COURT: Right. It's obviously something you
12 want to discuss with the Committee.

13 MR. SCHROCK: Of course, very much.

14 THE COURT: Okay, all right.

15 MR. SCHROCK: Your Honor, a quick Chapter 11 plan
16 update. Following several weeks of discussions with the --
17 with certain Creditors and the Unsecured Creditor's
18 Committee, we have filed the Chapter 11 plan and a company
19 disclosure statement to wind up the affairs of these Chapter
20 11 cases.

21 A few notes on this point. As everybody I'm sure
22 is very aware that the cases are -- they're expensive. The
23 administrative costs are significant. There's only one way,
24 we believe, to finish these cases, and that's to start the
25 clock. We've set a -- asked for a disclosure statement

1 hearing for May 16th. We think that by starting the clock
2 and working with the stakeholders and really driving the
3 process leading from the front and getting people to focus
4 on what's really necessary in order to wind up the estates,
5 that's the only way it's going to happen.

6 But this is after, you know, roughly serving out
7 60 days ago the first draft of a plan. You know, I think
8 some claimants would say let's please wait. And you know,
9 our view, our strong view here is that if you don't have
10 deadlines associated with the plan process, gravity will
11 take over. And it's very difficult to get the estates
12 efficiently wound up.

13 There's still a significant amount of work. Even
14 though the assets are largely gone associated with the
15 ongoing operations, there's very significant services that
16 are still being provided by the estate, including transition
17 services, issues related to executory contracts, cure
18 reconciliation.

19 And I wish I could tell Your Honor that it's just,
20 you know, it's a one-person job at Weil and Akin to, you
21 know, go through all of those claims, but it's not. It's
22 literally, you know, hundreds of inquiries every day and
23 trying to work through the employee issues, the regulatory
24 issues, the bank issues. There's still quite a bit that's
25 going on, so those transition services are ongoing, and you

1 know, we know that we have to wrap things up.

2 The plan overall, it's a non-consolidated plan.
3 It's a straight, what I call waterfall plan, with only one
4 settlement at this time incorporated, which is with the
5 PGBC. The plan has a mechanic that's under discussion for
6 resolving inter-company claims, which remains open. So like
7 any company, Sears did not have cash at every legal entity
8 within the structure.

9 Some entities have cash, some entities don't, some
10 have -- we know more assets, some have less, and that's very
11 common in our experience in any complex structure. So to
12 deal with this issue, we have a non-consolidated plan and an
13 ability for one Debtor to make loans to another Debtor, if
14 they believe there are sufficient recoveries to deal with
15 it.

16 We're also in discussions with certain Creditors
17 around, is there a compromise around inter-company claims
18 that everybody can get behind. As you might imagine, that's
19 a very -- it's a very complex negotiation, but we do think
20 we have at least one mechanic to preserve the integrity of a
21 non-consolidated plan.

22 The 503(b)(9) claims bar date has passed. We
23 expect to complete the initial reconciliation of claims in
24 the next few days and we'll sit down with the Unsecured
25 Creditor's Committee and professionals to review them. I

1 think the good news is that based upon our preliminary
2 review, that we think valid claims are coming in right
3 around the range that we have previously disclosed to
4 parties in interest in the Court and in line with the
5 Debtor's expectations.

6 We do have, of course, the Transform Co
7 assumption, or not assumption, reimbursement of
8 approximately \$140 million of those claims, which Mr.
9 O'Neill likes to remind me would be subject to offset, if
10 there are any costs that would be going the other direction.

11 507(b) claims, which parties in, you know, some
12 parties that are surveyed are very significant numbers are
13 just treated as a straight waterfall under the plan. We do
14 not have a global settlement with 507(b) claimants at this
15 time. We've had initial discussions with Cyrus, which I
16 would characterize as hopeful and somewhat productive.

17 I wouldn't say that they were vigorous at this
18 point. But our focus was to sit down with the UCC, get to a
19 deal -- try and get to a deal. We didn't reach a deal yet.
20 But at least file it and use the filing of the plan as a
21 mechanic to sit down with the large 507(b) claimants in
22 these cases, in the very near future.

23 So in that vein, our plan is to sit down in the
24 next week with the key stakeholders, including Cyrus,
25 Wilmington, ESL, so that we can address how some of those

1 507(b) claims can be teed up with the Court. I've had some
2 initial discussions with ESL's counsel just around, you
3 know, if it's an estimation proceeding or the right, at
4 least procedural mechanic to get those in front of the Court
5 in conjunction with a plan process as well as a reserve
6 mechanic.

7 But we believe firmly that the structure in place
8 and the tension of a disclosure statement here and a
9 confirmation hearing, that we're going to be able to lead
10 parties to get to something that's workable to wind up the
11 affairs of the estate. We have to wind this up some way,
12 and we believe this is the best way to do it.

13 There's a litigation or a post-consummation trust
14 that I referred to earlier that's in the plan. That was
15 after a great deal of coordination among the tax
16 professionals at Akin and Weil that we believe that that's
17 the right structure for claim holders and beneficial
18 interest holders in the trust.

19 We've left the governance of the trust open as
20 TBD. That's subject to ongoing negotiations with
21 stakeholders, including the 507(b) claimants in the UCC.
22 We've left the position of the litigation trustee open at
23 this time. It's still being subject to negotiation. You
24 know, we just also wanted to mention the administrative
25 claims bar date.

1 We do have that concept in the plan. When the
2 particular date is still subject to discussion. We've dealt
3 with this issue in two ways in prior cases, including cases
4 in front of this Court, where we've had the admin claims bar
5 date, you know, at confirmation or even sometimes in advance
6 of confirmation. We've heard from stakeholders arguing each
7 way, but we'll certainly resolve that over the next couple
8 of weeks.

9 And then, finally, on releases. There's a
10 mechanic in the plan that provides that if a party's named
11 in a plan supplement document or otherwise in a complaint,
12 they will not be released. The releases under -- are under
13 the exclusive authority within the Debtors of the
14 restructuring subcommittee, consistent with their mandate.
15 Those issues are still being under discussion, but that's
16 the mechanic that's in there right now.

17 THE COURT: And you're referring to releases by
18 the Debtor's estate?

19 MR. SCHROCK: Yes, thank you, Judge. Yes, just
20 Debtor releases. There is not non-consensual -- there are
21 no non-consensual third party releases in the plan.

22 THE COURT: Okay.

23 MR. SCHROCK: And then finally, Your Honor, just
24 as I referred to earlier, there's, you know, related to the
25 other work that's ongoing at the estate, there's quite a few

1 disputes that we're still working through with Transform Co.
2 Some of those are up today.

3 We are providing, you know, pretty extensive
4 transition services at this point, and we still have all of
5 the employees that are still employed effectively by the
6 Debtors and are being leased to Transform Co. So we have
7 numerous deals that have to be worked out with Creditors and
8 Transform Co to allow those parties to have a fresh start
9 with new Sears, and as well, still balance the estate
10 interests that we're not compromising the claims that have
11 been reserved for the benefit of the estate, namely the
12 preferences and the other litigation issues.

13 But the work is time intensive. We are very
14 mindful of the costs in this case, and we are going to do
15 our level best to try and get these estates through a
16 confirmed plan process by July. And we have, you know,
17 tentatively talked with parties about, you know, a date for
18 confirmation around the third week in July.

19 So we don't have broad support for the plan at
20 this time, but we believe the getting in on file and driving
21 the process is the right answer for these estates. And
22 then, finally Your Honor, I know that the parties made
23 notice we did -- the restructuring subcommittee did file a
24 complaint last -- late last evening against a number of
25 parties. I'm sure there'll be plenty of time for discussion

1 on those issues at another point. But you know, that action
2 is in fact under way.

3 THE COURT: Okay. Does anyone have anything to
4 say on that report? Okay. Well, obviously, the Debtors and
5 their professionals have the task of moving the case along
6 as promptly and efficiently as possible. I appreciate there
7 are a number of steps that need to be taken before you're
8 nearly at the point to confirm a plan, but it clearly to me
9 makes sense to be moving forward as you are within active
10 consultation with the key parties in interest.

11 It's in their interest, too, except perhaps,
12 although I think it's in their interest also, parties that
13 may view themselves more as litigation targets than
14 Creditors. But frankly, I think resolving the cases
15 promptly is in everyone's interest.

16 And in that regard, I only have a couple of
17 observations. The first is that if the cost of doing your
18 company analysis or the difficulty of it exceeds the
19 benefit, you know, there is an alternative, which is
20 substantive consolidation, so that's something to be aware
21 of.

22 MR. SCHROCK: Yes, Your Honor. We're chiefly
23 aware of that and --

24 THE COURT: Okay.

25 MR. SCHROCK: -- I think we're hopeful that

1 reasonable minds will agree on something.

2 THE COURT: Well, it depends - I mean it's a
3 factual show, if you can actually make the analysis, then
4 ignore what I just said.

5 MR. SCHROCK: Yes.

6 THE COURT: Secondly, as far as the necessary
7 reconciliation of claims is concerned necessary for
8 confirming a plan that is, you're absolutely right. They're
9 under the authority to estimate claims.

10 And given the actual outcome of the sale and the
11 related GOB sales, that should be a much easier process. So
12 again, it's not something that I think parties should spend
13 a lot of time and money on trying to negotiate, if there's
14 just an impasse. I think you may just want to tee up an
15 estimation on that -- on that score.

16 MR. SCHROCK: That's -- that was our thinking
17 exactly, Your Honor.

18 THE COURT: Okay. I mean, unlike when it was
19 being discussed during the sale hearing, when I was asked to
20 compare alternatives as far as 507(b) claims are concerned,
21 we don't have an alternative scenario here. We actually
22 have the facts, so I think it's a lot easier to decide at
23 this point.

24 MR. SCHROCK: Thanks very much.

25 THE COURT: Okay. So why don't we proceed then

1 with the agenda?

2 MR. SCHROCK: Yes, Your Honor. The first item on
3 the agenda is the Debtor's motion to enforce the asset
4 purchase agreement automatic stay against Transform Holdco,
5 and I'll cede the podium to my partner, Mr. Friedmann.

6 THE COURT: Okay.

7 MR. FRIEDMANN: Good morning, Your Honor, Jared
8 Friedmann from Weil, Gotshal on behalf of the Debtors.
9 Before I get into the credit card accounts receivable issue
10 we were discussing at the last hearing, I wanted to put on
11 the record where we are with respect to the interim
12 agreement we advised you of at the last hearing regarding
13 the two other categories of assets that we've moved on in
14 our motion to enforce the automatic stay.

15 THE COURT: Okay.

16 MR. FRIEDMANN: As we advised you then, the basis
17 of that agreement was that there were initial payments that
18 were to be made to Debtors on March 26th. And then, we gave
19 Transform until April 3rd to complete the reconciliation
20 process and pay us whatever the remainder was of the
21 undisputed amounts.

22 So with respect to the cash in transit, and those
23 are the pre-closing proceeds that ended up in Transform,
24 because we had transferred the cash management system over
25 to Transform at closing, so these were pre-closing proceeds

1 that ended up in the bank accounts they were intended for,
2 but those bank accounts were no longer in our possession so
3 they went over to Transform and we were moving to get them
4 back.

5 So on March 26th, consistent with our agreement,
6 the Debtors were paid \$3 million and they were produced
7 documentation regarding the reconciliation at that point.
8 On April 3rd, pursuant to the agreement, Transform was
9 supposed to pay Debtors any amount above and beyond that \$3
10 million initial payment and to also provide us with
11 additional reconciliation.

12 On April 4th, Transform confirmed that the total
13 amount of cash in transit in the cash management system was
14 \$22.5 million, so \$19 and a half million more than they had
15 paid us on March 26th. There is no dispute regarding that
16 \$22.5 million number. To date, however, Transform has
17 refused to turn over that \$19 and a half million delta in
18 cash in transit proceeds. And again, these are dollars that
19 we would have had in our bank accounts, had we not given
20 them our bank accounts.

21 THE COURT: And what's the stated rationale for
22 not paying it?

23 MR. FRIEDMANN: The stated rationale, as we
24 understand it, and this is for both the cash in transit as
25 well as the rent proration, which I'll discuss in a moment,

1 is, as we understand it, that there are other set-offs. And
2 in our discussions, we've reminded Transform of Your Honor's
3 admission at the last hearing that set off our -- an excuse
4 and they still violate the automatic stay. It hasn't worked
5 yet so far.

6 So as -- we're willing to give Transform until
7 next Thursday to turn over these funds to us, otherwise, we
8 anticipate moving on an expedited basis to have another
9 hearing because we need these dollars now.

10 THE COURT: And has Transform identified to you
11 what the basis for the claims over are?

12 MR. FRIEDMANN: There are a series of various
13 setoffs and reconciliations that necessarily are happening
14 between the companies and we're happy to work through those.
15 Our point with respect to both the cash in transit and the
16 rent proration, these are announced at our estate property
17 and were supposed to be turned over to us immediately.

18 No doubt there would be later reconciliations on a
19 number of other issues, which we're happy to work through
20 with them, but these are -- this is estate property that
21 they're holding onto and not turning over on the rent
22 proration and the APA --

23 THE COURT: Can I interrupt you?

24 MR. FRIEDMANN: Please.

25 THE COURT: I understand reconciliations. That

1 presumes that the parties still trying to work out what is
2 owing. But I'm trying to understand whether Trans Co has
3 asserted that there are actually separate and apart from
4 just trying to figure out the ultimate purchase price,
5 whether there are amounts owing by the Debtors to it, that
6 would be the set off. The rest is a reconciliation of
7 amounts that are to be paid and still to be decided to be
8 paid, in other words.

9 MR. FRIEDMANN: Yeah, so it's a series of other
10 set offs, and there are other buckets where monies are owed
11 from Debtors to Transform Co.

12 THE COURT: Okay.

13 MR. FRIEDMANN: And so, they're using those other
14 buckets to offset the cash in transit and the real estate
15 prorations, as we understand it at this point.

16 THE COURT: Are those owed under the purchase
17 agreement? It's asserted as being owed under the purchase
18 agreement? I don't understand. They're the buyer. Why
19 would the Debtor be owing them money except as part of
20 reconciling the ultimate purchase price?

21 MR. FRIEDMANN: Yeah, so that's exactly what --
22 it's reconciling -- they should --

23 THE COURT: Well, but that's reconciling amounts
24 that were made to be paid as opposed to amounts that are
25 already owing.

1 MR. FRIEDMANN: Correct.

2 THE COURT: I think that's the important
3 distinction. So I just reiterated what I said last time. I
4 don't see any basis not to pay this money, unless you know,
5 they disagree and say that the Debtors independently owe
6 Trans Co something, as opposed to Trans Co has the right
7 under the purchase agreement to adjust remaining amounts,
8 not these amounts, but other amounts that are still to be
9 fixed.

10 MR. FRIEDMANN: The -- just to be on the record
11 also, respectfully, the rent -- the February rent proration,
12 they are too consistent with the agreement on March 26th,
13 Transform paid Debtors \$5 million and produced documentation
14 at that time, calculating where -- how they've gotten there
15 so far.

16 On April 3rd, they were supposed to pay any
17 amounts over that \$5 million owed in rent proration and
18 provided Debtors with backup. On April 4th, Transform
19 advised and it confirmed that \$14.9 million in rent
20 proration was due. They were still reconciling apparently
21 another \$1.3 million of that.

22 Now while we believe that the \$1.3 million is also
23 due and owing to the Debtors, the \$9.9 million delta between
24 the \$5 million they gave us on March 26th and what they had
25 already determined was owed by April 4th has also not been

1 paid. So in total, there is the \$19.5 million in cash in
2 transit, plus the \$9.9 million in rent proration.

3 So \$29.4 million in total that we believe is
4 estate property that should be turned over immediately, and
5 as I said, it is -- we've -- you know, we're happy to wait
6 until next Thursday for them to do what needs to be done to
7 get that money to us, but if we do not receive that money by
8 next Thursday, we do anticipate moving the Court on an
9 expedited basis.

10 THE COURT: Okay.

11 MR. FRIEDMANN: And the turn now to the credit
12 card receivables account at issue. So as I -- a preliminary
13 matter, I just wanted to move into evidence the second
14 supplemental declaration of (indiscernible) in support of
15 the motion to enforce, which is Document 3080.

16 THE COURT: Okay. As I understood it, the parties
17 were not going to be treating this as a hearing with live
18 testimony. Is that correct?

19 MR. FRIEDMANN: I believe from my discussions with
20 my colleagues at Cleary that neither of us intend to call
21 any witnesses today.

22 THE COURT: Okay, all right, so if there's no
23 objection to the admission of that declaration, subject to
24 sometime in the future if need be, you have the right to
25 examine the witness on anything other than just the

1 documents that were provided. Okay, I'll admit it, then.

2 (Document 3080 Admitted Into Evidence)

3 MR. FRIEDMANN: So Your Honor, the Court asked the
4 party to submit a supplemental briefing addressing whether
5 the credit card processing agreements filed by the buyer on
6 the eve of the March 21st hearing helped clarify in any way
7 whether or not the reserve accounts at issue fall within the
8 APA's definition of credit card accounts receivable.

9 THE COURT: Right. And I also wanted to make sure
10 I had all of those agreements, which I believe I do now, I
11 have.

12 MR. FRIEDMANN: They would know better than we do,
13 and we're assuming that they've pre-solved them.

14 THE COURT: Okay.

15 MR. FRIEDMANN: And frankly, I'm not sure it
16 matters that much because from the agreements that we've
17 seen, those agreements demonstrate or at least do nothing to
18 refute that the reserve accounts do in fact fall within the
19 definition of credit card accounts receivable.

20 The buyer's initial brief and then their
21 subsequent reply brief repeat the same argument over and
22 over again, and because the reserve accounts describe their
23 treated something and as they -- a security in the
24 processing agreements, that therefore, those reserve
25 accounts must also be a security deposit and cannot be

1 credit card accounts receivable within the meaning of the
2 APA.

3 And that argument, we submit, is fundamentally
4 flawed. The fact that the reserve accounts are described or
5 treated as security under the processing agreements does not
6 mean that they'd be -- necessarily become security deposits
7 within the meaning of the APA. All that matters here is how
8 the Debtor and the buyer define credit card accounts
9 receivable in the APA, and whether the reserve accounts fall
10 within that definition, which they plainly do. Likewise --

11 THE COURT: That's because the operative paragraph
12 is Paragraph 10?

13 MR. FRIEDMANN: I think the operative paragraph is
14 the definition of credit card accounts receivable, which is
15 --

16 THE COURT: Well, I understand, but --

17 MR. FRIEDMANN: Right. And then 10.9.

18 THE COURT: It flows through Paragraph 10 because
19 that's the mechanism where credit cards accounts receivable
20 comes into play.

21 MR. FRIEDMANN: That's correct, Your Honor. But -
22 -

23 THE COURT: Okay.

24 MR. FRIEDMANN: -- and credit card -- it includes
25 the defined term credit card accounts receivable, which

1 requires you to go back to the definition.

2 THE COURT: Right.

3 MR. FRIEDMANN: Likewise, the fact that the
4 reserve account serve a security under collateral to protect
5 the processors from default doesn't change the fact that the
6 reserve accounts are ultimately due and payable to Sears, a
7 fact that the buyer does not and cannot really dispute. In
8 fact, in their initial moving brief, they cite the American
9 Express amended agreement in Section 2, which explains that
10 although American Express was not currently obligated to pay
11 Sears anything in their reserve accounts, it ultimately is
12 obligated to return an amount equal to the amount in the
13 reserve, not of any current obligations. So at all times,
14 that money is due and owing to Sears, there just may not be
15 a payment obligation right away.

16 The buyer also argues in their reply brief that
17 the terms in the same and related agreement should be given
18 the same meaning. But of course, the APA and the processing
19 agreements are not in the same, nor are they even related
20 agreements. In all the cases the buyer sites for that
21 proposition are at opposite because they concern provisions
22 that are in the same agreement or transactions that were
23 intertwined or multiple contracts in a single transaction,
24 so none of that case law is applicable here.

25 Similarly, the buyer's argument in their reply

1 that the processing agreements are integrated into the APA,
2 (indiscernible) by the integration clause at 13.4 in the
3 APA. The buyer also argues that the processing agreements
4 were the backdrop against which the APA was drafted.

5 Accepting that premise as true for a moment, Your
6 Honor, it's notable that not only are the reserve accounts
7 not carved out from the APA's definition of credit card
8 accounts receivable, but Section 2.10, which lists almost
9 every conceivable type of security from restricted cash to
10 letters of credit to utility deposits and everything in
11 between. But what doesn't it include are reserve accounts
12 held by the credit card companies.

13 Why is that? It's because they're already covered
14 and included within the broad definition of credit card
15 accounts receivable. And Your Honor, as we discussed in the
16 last hearing, even if the reserve accounts are a type of
17 restricted cash or other security or whatever buyer is
18 arguing today about where it falls under 2.1, the APA's
19 specific definition of credit card accounts receivable
20 controls over that broad catch-all provision in 2.10 or even
21 2.1 (indiscernible).

22 And as I mentioned early -- earlier, what really
23 matters is how the APA defines credit card accounts
24 receivable and whether the reserve accounts are in fact
25 credit card accounts receivable within the meaning of the

1 APA. And we submit that they are.

2 The APA defines credit card accounts receivable as
3 each account together with its proceeds owed by the credit
4 card payment processor to a seller, resulting from charges
5 by a customer of a seller on credit cards that are processed
6 by such a processor in connection with the sale of goods by
7 a seller or services performed by a seller, in each case in
8 ordinary course of that seller's business.

9 And unless you twist the words of the definition
10 of credit card accounts receivable, these reserve accounts
11 satisfy every element of that definition. The fact that as
12 we've learned recently First Data has agreed to release \$15
13 million of the \$28 million that its holding in reserve
14 accounts underscores our point that the reserve accounts are
15 in fact owed, and that they're far more liquid than the
16 buyer tried to portray.

17 Mr. Kamalani's latest declaration submitted with
18 the reply brief candidly admits in Paragraph 5 that the
19 reason First Data did not release the reserve accounts pre-
20 closing to Sears is that ESL refused to provide the
21 information that was requested. He then goes on to explain
22 in the next paragraph that after the closing, when Transform
23 did provide that information, First Data is not prepared to
24 release \$15 million.

25 So I want to stop there for a moment, because what

1 it demonstrates is that that money, at the time of closing,
2 was available to be released. It was owed, it was ready to
3 be released. All that had to happen was for ESL to provide
4 the information that First Data was requesting, and then \$15
5 million at that moment would have gone straight to debtors
6 and be in their pockets right now. We wouldn't be having
7 this issue.

8 But what ESL did was to say, "We refuse to give
9 you the information right now." As Mr. Kamalani says in his
10 declaration, they waited until after the closing and then
11 they went and gave that information, and now the \$15 million
12 is available.

13 There also can be no dispute that had, following
14 the sale hearing, the deal for some reason fallen apart and
15 that there was no deal with ESL, and Sears had to go through
16 a liquidation, the amount in those reserve accounts would
17 have gone right to the debtors.

18 The agreements would have been done and save for
19 any chargebacks, but you go into a going out of business
20 deal, there are no returns. There aren't even any
21 chargebacks. There's a lot of money flowing in. The
22 reserves clearly would have gone to debtors because that
23 money was always owed to debtors.

24 THE COURT: Well, can I -- I want to make sure I
25 understand what you all are really fighting over,

1 practically. 10.9 of the APA is the provision that sets
2 forth an aggregate amount of inventory value, amounts due to
3 seller with respect to credit card accounts receivable, and
4 pharmacy receivables, and says that it should be at least
5 \$1,657,000,000.

6 And then it says that to the extent that that
7 amount -- the amount of those three items exceeds,
8 \$1,657,000,000, sellers may reduce such amount to be equal
9 to that number by first transferring inventory and second
10 retaining as an excluded asset, the oldest of any credit
11 cards account receivable.

12 So that's a mechanism that comes into place that
13 refers just to credit card accounts receivable, right? It
14 doesn't have anything to deal with security deposits.

15 MR. FRIEDMANN: That's correct.

16 THE COURT: One can conclude, therefore I think,
17 that if something is both a credit card account receivable
18 and a security deposit, that paragraph would operate just
19 fine. It doesn't matter whether a security deposit, you
20 just use the paragraph because it all refers to accounts
21 receivable.

22 MR. FRIEDMANN: That's correct, Your Honor.

23 THE COURT: Okay. Is there some other provision
24 of the agreement that applies to require the security
25 deposits to be held? In other words, are you saying that

1 you're entitled, the debtors are entitled to other money
2 constituting credit card accounts receivable because it's
3 not a security deposit? Or are we just arguing about the
4 operation of 10.9?

5 MR. FRIEDMANN: What we're arguing about is the
6 operation of 10.9, and I think the key factor here is
7 whether or not those reserve accounts were considered part
8 of the credit card receivables to get to the threshold.

9 THE COURT: I understand that. But in your
10 explanation about they should pay us the \$15 million now, I
11 wanted to make sure I understood your basis for saying that.

12 MR. FRIEDMANN: Let me reclarify also that point,
13 is that we do not dispute that what 10.9 entitles us to is
14 the oldest of any credit card accounts receivable.

15 THE COURT: Okay.

16 MR. FRIEDMANN: So if Your Honor was to order than
17 what we're entitled to is \$14.6 million of the oldest credit
18 card receivables, and that First Data should release \$14.6
19 million of only the oldest credit card receivables to us, we
20 have no issue with that.

21 THE COURT: Okay. So you're not arguing then that
22 Transform is obligated to release all of the reserve amounts
23 because they're credit card accounts receivable. You're not
24 arguing that.

25 MR. FRIEDMANN: No, and there's a suggestion in

1 their brief that we're suggesting that the reserve accounts
2 were not transferred or we were arguing they should not have
3 been transferred. All of the security deposits, all of the
4 accounts receivable, all of that went to Transform.

5 The point is that that in that happening, and in
6 light of the fact that there also were pre-closing
7 transactions that had not yet cleared, they ended up in
8 excess of the \$1.657 -- not only by the \$7 million that was
9 recognized at the closing which is why there was property,
10 inventory transfer, but it ended up being an additional
11 \$14.6 million, as they learned about a week a later when all
12 those credit card transactions had cleared.

13 THE COURT: Okay, all right. That's fine. I just
14 wanted to make sure I understood the extent of your claim or
15 your demand.

16 MR. FRIEDMANN: And the last point I wanted to
17 make, Your Honor, was on this point exactly, which was that
18 at the closing, Transform conceded that the debtors had met
19 and exceeded this \$1.657 billion threshold -- and that's
20 demonstrated in the emails between counsel for debtors and
21 ESL, which are attached to Mr. (indiscernible) declaration
22 that we just put into evidence. It was only hours before
23 closing the parties had agreed that debtors would be
24 delivering in excess of \$7 million above the aggregate
25 threshold in 10.9.

1 And the email shows that the parties agreed at
2 that point that at ESL's request, the debtors would take \$7
3 million in prepaid inventory that was still at the vendor's
4 facility instead of taking inventory that was already in
5 transit. And my understanding is the reason for that swap
6 was that the inventory already in transit could go towards
7 the borrowing base, whereas the prepaid inventory that was
8 still at the vendor could not.

9 So we agreed to accommodate them in order to get
10 this deal to close at that point, but -- and first of all,
11 the characterization by the way in the briefing that there
12 was some threat made that they had to do this, that's just
13 ridiculous. But it's also not the point.

14 The point is that there would be no \$7 million in
15 excess of inventory to be transferred unless the \$1.657
16 threshold was met. And that threshold is met only if the
17 reserve accounts were treated as part of the credit card
18 accounts receivable in 10.9 by both parties.

19 Your Honor, in the end, you have before you an
20 agreement whose terms are unambiguous. The definition of
21 "credit card account receivable" is enough to clearly
22 embrace the reserve accounts, even in the context of what we
23 see in the proxy agreements. At the end of the day, this is
24 about what the agreement says, not what ESL made, not which
25 they had negotiated.

1 For that reason, we ask the court to enforce the
2 automatic stay and order First Data to release, \$14.6
3 million currently held in reserves to the buyer. I'm sorry,
4 to the debtors. Thank you.

5 THE COURT: Okay.

6 MR. LIMAN: Your Honor, Lewis Liman for Transform.
7 My colleague, (indiscernible), is prepared to answer briefly
8 the questions with respect to cash in transit, if Your Honor
9 has questions about that. The bottom line is we didn't know
10 that that was on the agenda for today.

11 THE COURT: No, I just wanted to makes sure I
12 understood it, because again, the issue about the automatic
13 stay is a serious one, and I wanted to make sure Transform
14 appreciates the difference between setting off a claim
15 against another claim or withholding cash based on a claim
16 setoff right, which would violate the automatic stay.

17 The difference of that concept from the concept of
18 adjusting accounts through a reconciliation process, which
19 is recoupment, which is not subject to the automatic stay.
20 And if it's the former, we should stop it.

21 MR. LIMAN: Okay. We have serious quarrels with
22 Mr. Friedmann's representations.

23 THE COURT: Okay, that's fine. We don't need to
24 get into that today. I just wanted to give everyone a
25 head's up on how I think that issue should be viewed as far

1 as the automatic stay is concerned.

2 MR. LIMAN: Your Honor, with respect to the credit
3 card accounts receivable security deposit issue, we've got
4 several points that we wanted to highlight. The first is
5 that, you're quite correct, that the operative language to
6 focus on is 10.9, which has two components as applicable
7 here. One is that it has to be credit card accounts
8 receivable, and second it has to be due.

9 Now from the beginning of this case -- and I mean
10 from the beginning of this case -- there has been a
11 distinction drawn between the notion of credit card accounts
12 receivable payer to debtors and reserve accounts. And when
13 I say, "from the beginning of this case," I'm referring to
14 the first stay order that was entered in this case.

15 It's Docket 1394, which refers separately to the
16 credit receivables payable to debtors, that's Paragraph 19,
17 and to the reserve accounts maintained by the payment
18 processors, and that's Paragraph 15. And that is obviously
19 a backdrop against which this was drafted.

20 THE COURT: Why is that?

21 MR. LIMAN: Why is that? Because I think, Your
22 Honor, the parties recognized from the very beginning -- and
23 I'll get into the detail with respect to this -- that
24 there's a difference between the amounts that were in the
25 reserve accounts and the credit payables. Different rights

1 that the credit card processors had with respect to those
2 funds.

3 THE COURT: Well the processes, I understand that
4 issue.

5 MR. LIMAN: And that, I think, ultimately
6 underlies a lot of the issues and a lot of the dispute
7 between us. What I'd like to do -- should I ignore that?

8 THE COURT: Well, let's see if anyone answers
9 that. I think that was just a glitch with the call.

10 MR. LIMAN: I'd like to focus on three or four
11 elements of the contract. The first is the definition of
12 "credit card accounts receivable." The second is the
13 definition of "due," the third is the notion of payment. In
14 order for something to be a credit card accounts receivable,
15 there has to be at least two elements.

16 First of all, it has to be a payment intangible,
17 and second, the payment intangible has to be owed as a
18 result of card charges in the ordinary course. Now we've
19 cited a case in our papers -- I noticed Mr. Friedmann did
20 not respond to it -- that a reserve account, payments that
21 are held in a reserve account, that were withheld from
22 payments otherwise due, do not constitute a payment
23 intangible.

24 The monies in essence of Sears of debtors that are
25 held by the card companies as security. That's the

1 Morristown Lincoln case, it's not answered. The second
2 element is these need to be a payment intangible --

3 THE COURT: Well, it says "account or payment
4 intangible."

5 MR. LIMAN: That's correct, Your Honor. And the
6 definition of "account," these would be an account under the
7 UCC as between the card processing companies and the
8 ultimate customers. So I think under the UCC, these would
9 not fall within the definition of account. They -- the
10 argument would be that they fall within the definition of
11 payment intangibles, but monies that have been held back on
12 behalf as security on behalf of another party are not
13 payment intangibles.

14 THE COURT: Why isn't it an account? It's owed.
15 They're holding it back because they have a right of set
16 off, which means there's another obligation which they owe,
17 which they're holding back to set off against.

18 MR. LIMAN: It's because it's cash that is held by
19 the card processing companies in the form of cash. So that,
20 I believe, under the UCC, would make it fall within the
21 definition of payment intangible, if anything. I do want to
22 focus though on the language about owed as a result of card
23 charges in the ordinary course. And I also want to focus on
24 the language of the card agreements.

25 Now Mr. Friedmann told you, and his briefs say,

1 that you should not look at the card agreements for their
2 definitions. I'd like to cite a couple of cases to you and
3 propositions that demonstrate that that's wrong. It's the
4 restatement of contracts 214 says that when you have related
5 contracts and you're trying to interpret a term, you look to
6 those related contracts. And after all, what we're trying
7 to figure out here is whether these monies that are, that
8 are held by First Data, AmEx and Discover, in each instance
9 fall within credit card accounts receivable.

10 The other case I'd like to cite to you is the
11 Shiftan case, Delaware 57.935, Note 15. If you look, just
12 for example, and parse carefully the language of the First
13 Data agreement, that tells you what is payable from card
14 transactions in the ordinary course. The language almost
15 tracks the language that is in the APA. It refers to sales
16 data that come from card transactions in the ordinary
17 course.

18 And remember, ordinary course in the APA in this
19 instance is used in the lower case, not the formal upper
20 case, so it's got to be referring to something. Our view is
21 that it best refers to that language in First Data and in
22 the other agreements.

23 And then it tells you what is payable out of those
24 card transactions in the ordinary course. And what it tells
25 you is payable is a net amount. It's not just monies that

1 were furnished as a result of card transactions at the Sears
2 stores. The amount that is payable is an amount that is net
3 of reserve account amounts.

4 Now, the debtors would say, well the title, you
5 should disregard the title of credit card accounts
6 receivable because receivable and payable are not referred
7 to within the definition. But they also within the papers
8 say that the word "owed" equals payable. That's their
9 Paragraph 18.

10 And we would respectfully submit that in order to
11 determine what is payable, or what was receivable out of
12 card transactions in the ordinary course, you don't need to
13 go beyond the First Data agreement at Paragraph 4.3 and the
14 other related provisions.

15 Now, Mr. Friedmann also told you that reserve is
16 not mentioned within the APA, but he has no answer to the
17 fact that security is referenced within the APA. The
18 reserve is simply the account in which the asset is being
19 held. There's no -- it shouldn't be a surprise that reserve
20 is not being mentioned. The issue before Your Honor is what
21 to do and how to characterize that cash in the moment of
22 closing in the hands of the debtor.

23 And when the agreements before you refer in the
24 instance of First Data to an amount that is held for
25 protection against the risk of default, when they refer to

1 in the AmEx agreement as an amount that is collateral, when
2 they refer to in the Discover agreement as security, and in
3 the Discover agreement -- and I do have a correction I need
4 to make from my argument last time -- the Discover agreement
5 makes it quite clear that there is a security interest that
6 Discover has in these funds.

7 The correction that I have to make is that I fear
8 that I may have been misunderstood to suggest that the card
9 processing companies don't have a security interest in these
10 funds. I think they do, and I think what you need to do is
11 look at the UCC paragraphs or sections 3.12 to 3.14. It
12 says that when the funds are in the possession of the card
13 companies, that gives them a security interest without the
14 need for perfecting. I've got two more points I'd like to
15 make --

16 THE COURT: But they weren't granted a lien. They
17 have a right of setoff.

18 MR. LIMAN: They have a right of setoff. Under
19 the UCC, they've got -- they don't need to -- and right of
20 setoff actually is quite important, and I want to get back
21 to that in a moment. They don't need to have perfected
22 their filing --

23 THE COURT: No, but that's a different point.
24 That's perfection as opposed to a lien. And I think what
25 they have is a right of setoff, i.e., they owe Sears money,

1 which they have a right to offset against.

2 MR. LIMAN: That's correct, Your Honor. Now there
3 are two additional points that I want to make with respect
4 to just the definition of credit card accounts receivable.
5 The first is that when you look at the argument in the
6 definition that the debtors urge you to apply, which is to
7 say that the funds that were used to satisfy the reserve
8 obligation were generated from credit card receipts. As
9 we've pointed out, there is no limiting principle with
10 respect to that argument.

11 THE COURT: I don't understand.

12 MR. LIMAN: Well the point, Your Honor, is that in
13 each instance, Sears had an option when the card companies
14 said in order to continue to do business with us, we need
15 you to post security. Until First Data -- what First Data
16 said is you need to post a letter of credit. You've got an
17 option if you don't want to post a letter of credit to post
18 cash or to permit us to withhold. Similar mechanisms under
19 the AmEx agreement and under the Discover agreement. I
20 don't think there would be any dispute if the debtors here,
21 Sears chose pre-petition to deposit cash with the card
22 companies. That money would not constitute a credit card
23 account receivable. That money would be derived from credit
24 card transactions, and that's where Sears' money came from.
25 It's a retail business. Its revenues are all derived from

1 there.

2 THE COURT: But the parties actually use the term
3 "credit card accounts receivable." They didn't use the term
4 "cash." And that's the term that's used in 10.9.

5 MR. LIMAN: They did not --

6 THE COURT: I mean, I guess this is my ultimate
7 point. Why can't something be both a credit card account
8 receivable and a security.

9 MR. LIMAN: Your Honor, if you look at -- because
10 under 2.1D, we got the right to all of the acquired
11 receivables. And under 2.1P2, all of the security deposits,
12 free and clear.

13 THE COURT: Subject to 10.9. 10.9 doesn't take
14 those asway, it just says if the aggregate amount of the
15 three items listed in 10.9, including Item 2 of those 3, the
16 credit card accounts receivables exceeds \$1 billion, \$600
17 and some thousand, million dollars, then the debtors can
18 take from the bottom, from the oldest credit card accounts
19 receivable. It doesn't take away what the debtors sold. It
20 just says that the debtors actually sell more than the
21 billion six, they get this adjustment.

22 MR. LIMAN: There are two reasons, two other
23 reasons why they can't on these facts be both. One reason
24 is that what these funds on the facts of these agreements,
25 what these funds were doing was securing obligations of

1 Sears. And so they were not, in fact, payable to Sears.

2 There was no obligation to pay these --

3 THE COURT: It doesn't say "payable," it says
4 "owed." It says "owed by." And that's what a setoff is.
5 That's the underlying right to the -- that's the applicable
6 language in 2.10, setoff.

7 MR. LIMAN: Your Honor, I don't think there's any
8 dispute that "owed" also is a synonym for "is payable."

9 THE COURT: Then they would have used the word
10 "payable" instead of "owed." One is present, and one is
11 both present and future.

12 MR. LIMAN: But one of them is also has to be
13 derived, and this is the key language, that debt that is
14 owed has to be from the credit card transactions. It can't
15 -- in these instances, that debt is not owed as a result of
16 the credit card transactions.

17 THE COURT: Well how did -- I'm sorry, can we just
18 go through 1.1. Each account, or credit card receivable,
19 each account or payment intangible, each is defined in the
20 UCC, together with all income, payments, and proceeds
21 thereof owed, right, credit card payment processor, or an
22 issuer of credit cards to a seller, resulting from charges
23 by a customer of the seller on credit cards processed by
24 such processor or issued by such issuer in connection with
25 the sale of goods by a seller or service performed by a

1 seller in each case in the ordinary course of business.

2 So as I read the agreements, the credit card
3 processor agreements, they get the payments by the
4 purchasers, based on the processor or issuer being paid in
5 the ordinary course. And they owe that money to the debtor,
6 but they have the right to hold as a basis of setoff as
7 against a reserve.

8 So I mean, again, this agreement -- and we
9 clarified this when I was here for the debtor's counsel --
10 does not require the buyer to pay over the amount that's
11 being held, but it does, I think, require the buyer to pay
12 over effectively or not buy anything above the billion 657
13 in the form of the oldest credit card accounts receivable.

14 So it's just a business deal, that that was the
15 receivable. And it seems to me that these are credit card
16 accounts receivable -- I can't imagine that they aren't.
17 It's not -- that's the basis for the relationship. There's
18 no separate lien, it's just an offset.

19 MR. LIMAN: Your Honor, let me put it this way.
20 Let's imagine a different world in which First Data had
21 filed for bankruptcy. And First Data -- and the question
22 was what is the character of those funds that were held by
23 First Data. Remember, they're held in a separate account.
24 Only First Data gets access to those accounts. It's a
25 separate account that is funded.

1 Now in that alternative world, there will be two
2 questions. If it's an accounts receivable, then my
3 understanding is that that -- that Sears would be a general
4 unsecured creditor, just entitled to be paid on those
5 accounts receivable. I don't think that that is the
6 argument that Sears would be making in that instance.

7 What Sears would be saying -- and they would be
8 correct -- is that the money in the reserve changed
9 character once it was withheld from the accounts payable and
10 used to satisfy their obligation under the agreement. What
11 they would be saying in that instance is that they've got an
12 interest in those funds.

13 THE COURT: Who does?

14 MR. LIMAN: Sears would be saying that. And
15 there's a case that I would cite, Your Honor, with respect
16 to that very proposition. It's the Ionosphere case, 177
17 Bankruptcy 198. That's what Sears would be saying. And
18 what First Data would be saying is that by virtue of their
19 possession of those monies that belong to Sears, they've got
20 a security interest. Now, if you look at the --

21 THE COURT: No, there's no grant of a lien. They
22 would say they have a -- they would say they have a secured
23 claim because of a right of setoff, a contractual right of
24 setoff.

25 MR. LIMAN: And that would distinguish this from a

1 accounts receivable.

2 THE COURT: But the basis for the setoff is that
3 one party owes another party, and that party owes the other
4 party. They both owe each other, so it is an account.

5 MR. LIMAN: But let's take the American Express
6 Reserve for an example. American Express Reserve, those
7 funds are held --

8 THE COURT: Can I interrupt you for a second, sir?
9 The UCC definition of account means "a right to payment of a
10 monetary obligation, whether or not earned by performance."
11 And it includes, among other things, "arising out of the use
12 of a credit or charge card." So why isn't this a monetary
13 obligation arising out of the use of a charge card owed by
14 the processor, which however, the parties have agreed can be
15 held based on a right to setoff.

16 MR. LIMAN: Your Honor --

17 THE COURT: So it's an account obligation. It's
18 two mutual obligations.

19 MR. LIMAN: Your Honor, there's commentary onto
20 the UCC, and I can provide you cases. I don't have them
21 right here at the (indiscernible), but I'd be happy to
22 provide them this afternoon, that says that that language
23 from card transactions refers to the obligation between the
24 card company and the ultimate customer.

25 THE COURT: Fine, but it's a right to payment, and

1 that's what Sears has. It has a right to payment. It's not
2 earned yet. I'm sorry -- it's not payable yet, but it has a
3 right to payment.

4 MR. LIMAN: Your Honor, but let's just pass for
5 the moment the question of whether these are payment
6 intangibles or accounts.

7 THE COURT: Okay.

8 MR. LIMAN: They do need to result -- whether
9 they're accounts or payment intangibles, they're an
10 obligation. That's what unites payment intangibles and
11 accounts. They're obligations. The question that the rest
12 of the definition addresses is what is that obligation
13 derived from. It's not how is that obligation satisfied, it
14 is what is that obligation derived from.

15 THE COURT: Well, it's --

16 MR. LIMAN: That I think is the best --

17 THE COURT: All right, but I think you're arguing
18 that it is not an obligation owed by a credit card payment
19 processor resulting from charges by a customer of the seller
20 on credit cards processed by such processor.

21 MR. LIMAN: In the ordinary course.

22 THE COURT: In each course, the ordinary course.
23 But these were credit cards. The customers use them in the
24 ordinary course. The obligation was charged in the ordinary
25 course. And this agreement in each case lays out the

1 obligation of the credit card processor to pay the amounts
2 over, except there's a reserve based on a right of setoff.
3 But if it's --

4 MR. LIMAN: Your Honor --

5 THE COURT: To me, it sounds like a credit card
6 account receivable.

7 MR. LIMAN: I do want to make sure I address my
8 other two arguments. I just want to make one more point
9 with respect to this. When you look at the nature of the
10 obligation, I think it is important to look at what triggers
11 the obligation to pay. In the case of credit card accounts
12 receivable, in the ordinary course there's a period of days
13 that come, and after those periods of days, you have to pay.

14 THE COURT: Right. I think our difference here
15 really stems ultimately from your view that the word "owed"
16 means payable.

17 MR. LIMAN: I don't think so, Your Honor.

18 THE COURT: Well, I mean to say that it's an
19 obligation to pay. Clearly the credit card processor has an
20 obligation to pay eventually if it turns out that the
21 reserve is not required.

22 MR. LIMAN: That's not our position. That's not
23 our position. Our position is not that these have to be
24 immediately payable. Our position with respect to the
25 definition of credit card accounts receivable is that the

1 obligation that was triggered that gave rise to the need to
2 put those monies with the card companies has to have been
3 triggered from card transactions in the ordinary course.

4 It can't be that it was triggered by the fact that
5 in the past there were card transactions. There was a
6 lingering liability. That's the facts here. There's a
7 lingering liability. The company is in financial strain,
8 financial distress that reserve accounts --

9 THE COURT: But there's nothing in the credit card
10 agreements dealing with the company being in financial
11 distress. This is an ordinary course arrangement. They
12 always have the reserve.

13 MR. LIMAN: That's not true, Your Honor. That's
14 not true.

15 THE COURT: Well the agreements don't speak about
16 financial distress.

17 MR. LIMAN: They do. If you look at 4.7 of the
18 First Data agreement. I want to be careful about using the
19 precise language because it's confidential. But you will
20 see that there's a trigger there that refers to the
21 revolving credit facility.

22 THE COURT: But is there anything in the record to
23 suggest that this money was withheld on that basis as
24 opposed to on the basis of all the other language that lets
25 them create a reserve because of a concern about --

1 MR. LIMAN: Yes, Your Honor. I'm glad you asked
2 that question. If you were to look at the Rolacheck
3 affidavit, Exhibit B, it tells you why that reserve account
4 was triggered.

5 THE COURT: Well, I'm sorry -- when you say
6 triggered --

7 MR. LIMAN: Why the obligation was created to put
8 funds in that reserve. It's not the point within 4.4, which
9 is what the debtors had cited to you. The provision that
10 First Data invokes, Section 4.7. And the only triggering
11 condition under 4.7 is the provision with respect to the
12 revolving credit facility.

13 THE COURT: Okay.

14 MR. LIMAN: And Your Honor, I would understand
15 your argument if the card companies invoked separate
16 provisions that exist under each of the agreements for
17 delayed accounts payable. They did not trigger to invoke
18 those here. Let me just address briefly two other, we
19 think, dispositive points that I don't think are answered.
20 And that I think there's been some confusion about.

21 THE COURT: Okay.

22 MR. LIMAN: The first is with respect to whether
23 these count against the 10.9 path. And if you read that
24 provision carefully as it was written, it has two elements.
25 One is that it has to be credit card accounts receivable,

1 and the second is due to sellers. That's the language of
2 10.9.

3 Now my colleague would have you either say that
4 due to seller means immediately payable and would caricature
5 our argument. And again, that is not our argument. Or they
6 would say that that language is just surplusage and means
7 the same thing as owed, and that's contrary to principles of
8 contract interpretation. It's also contrary to the purpose
9 of the provision and contrary to the APA itself.

10 And I'd like to cite a couple of things to Your
11 Honor. The first in terms of how that language of due is
12 used in the APA, the drafters were quite careful to draw
13 distinctions between things that would be due or would
14 become due. You can look at the definition of "liability"
15 under the APA.

16 You can also look at 2.3K little 1, which talks
17 about obligations that transforms obligation to pay
18 liabilities as they become due in the ordinary course. If
19 there was an intent here to pick up things that would become
20 due in the ordinary course, that could be -- it could be
21 drafted that way.

22 So there could be an obligation that can become
23 payable in the future that is not currently due. And for
24 that -- and the definition that the case law gives to that
25 is to say that you have an amount is due when there is a

1 fixed, settled obligation. It's in re: Hamilton Krieg, 143
2 F3rd, 1381; in re: Rubina Metro, 522 Bankruptcy 656; and
3 Black's Law Dictionary definition of "due."

4 And Your Honor, I think that language is
5 critically important. First, it corresponds to what is in
6 fact payable under the card agreements. In each of the
7 instances of card agreements, it refers to two separate
8 potential sums of money. One is the sums of money that are
9 payable on the regular schedule three days, four days, five
10 days after the sales data is submitted. There's no question
11 here that those would be credit card accounts receivable,
12 that even if they were not immediately payable, would count
13 against the 10.9 cap.

14 There is the separate provision -- and here Mr.
15 Friedmann, I think, made some critical concessions that are
16 the sums that are held in the reserve accounts. Those
17 numbers first of all, you heard him say, we don't know what
18 they are. They're going to be the amount that's in the
19 reserve less what the obligations are from chargebacks.

20 And if you look at the agreements themselves, in
21 terms of when if ever they would become payable or there
22 would be an immediately enforceable right, is entirely
23 unclear. What is clear is that there was no immediately
24 enforceable right at the time of the closing to the return
25 of those monies.

1 In each instance, it had to be that there was
2 trigger conditions that were satisfied that had not been
3 satisfied, and as to which there was no date certain. Now,
4 they misquoted Mr. Kamalani from his declaration. I assume
5 you've got the declaration in front of you. I'm not going
6 to just repeat that. I do want to address --

7 THE COURT: Well how did they misquote him?

8 MR. LIMAN: They misquote him by saying that those
9 monies would have been -- if we had only delivered
10 Transform's financial condition and information about what
11 Transform's condition would look like post-closing, then
12 First Data would have released all of the reserves,
13 including the oldest of the reserves.

14 If you look at the letter from First Data and the
15 email that they quote, that's not what First Data says. And
16 if you look at Mr. Kamalani's declaration, even today after
17 we've provided that information, it's not the position that
18 First Data and the others have taken. Their position is
19 that they still have the right to a reserve, and we have no
20 entitlement to get any of that money back.

21 They're willing to put some, not released to us,
22 in reserve. But they're not resisting the notion that we
23 have a current entitlement to it. That's -- now, I don't
24 think that that is particularly here or there with respect
25 to what the communications were. We plainly didn't have an

1 obligation to turn over business information to First Data.
2 First Data still has not agreed to the turnover. I do think
3 that there's one other -- two other critical points.

4 THE COURT: Did they assign the First Data
5 agreements to transform?

6 MR. LIMAN: The debtors did assign the First Data
7 agreements to Transform, pursuant to the APA, the moment
8 that the transaction closed, those agreements were assigned
9 to us and we've exercised the right to assume those. And
10 those agreements have been assumed (indiscernible), with all
11 of the duties and rights that go with them.

12 And they were at the time the transaction closed,
13 we were delivered a schedule. That schedule had listed on
14 them the reserves. We believe that the reserves were being
15 delivered to us. There was no effort made to hold back on
16 any of the reserves. And that's what happened at the moment
17 of closing. There was a dispute over the \$7 million.

18 You've seen the different parties' views with
19 respect to that. Our view that we were threatened. They
20 say that they've got a different view. We think our facts
21 would be right. The point is that the moment that an
22 agreement was reached with respect to that \$7 million, we
23 thought they had every expectation to believe that those
24 contracts with each of the card companies were our contracts
25 that were assigned to us. And when we assume them, we had

1 the right to assume them.

2 From the card companies' perspective, which I
3 think is also recorded, to look at from this perspective,
4 the card companies also had the right to assume that when
5 they decided not to object to the APA because there were
6 reserves there, that those reserves would be kept in place.

7 Mr. Friedmann has said that all you have to do is
8 order First Data to release the reserves. I don't think
9 that that is what First Data had in mind at the time of the
10 sale hearing, and I don't think that that's what the APA has
11 in mind.

12 THE COURT: Well, First Data hasn't taken a
13 position here though, right?

14 MR. LIMAN: I think this is the first time that
15 we've heard the debtors say that Your Honor should enter an
16 order requiring them to turn over the reserves. They've
17 been very unclear about exactly the type of relief that
18 they're seeking. In our mind, the only relief --

19 THE COURT: Well they -- okay, there's this
20 dispute as to whether they're prepared to turn them over.

21 MR. LIMAN: I don't think there's even a dispute
22 as to whether they're prepared to release them.

23 THE COURT: Well ultimately, the purpose of the
24 reserve is to protect them against returns and chargebacks.
25 Once they figure out that there aren't any returns or

1 chargebacks, there's no reason to hold it.

2 MR. LIMAN: Well Your Honor, imagine the
3 hypothetical that you would have to engage in to figure out
4 what the true amount of that -- those receivables looked
5 like at the time of closing.

6 THE COURT: I'm sure they have records to show
7 that. They processed the cards.

8 MR. LIMAN: I don't think so, Your Honor, because
9 you'd have to figure out which chargebacks are associated
10 with which transactions, going back in time to figure out --

11 THE COURT: But that's what you do.

12 MR. LIMAN: No, no, Your Honor. You don't always
13 link it to a particular transaction in order to figure it --
14 to do the tracing exercise. This money exists to satisfy
15 the chargebacks, whether those chargebacks are pre-closing
16 chargebacks, which are their liabilities, or chargebacks as
17 a result of post-transactions, which --

18 THE COURT: Right, but you can tell which is
19 which. You could tell what's pre and what's post.

20 MR. LIMAN: I don't know that you can in order to
21 figure out what the --

22 THE COURT: Well then, they're not really doing
23 their job, because they have to keep records and they have
24 to know what they're doing. I guess it's conceivable they
25 don't know, but then I don't know how they file proofs of

1 claim and assert rights to collect.

2 MR. LIMAN: They've got that reserved, but in any
3 event, the number's not going to be the \$14 million or
4 whatever. It's going to be a number net of the chargebacks
5 that would be associated with card transactions up until the
6 moment of sale. And that I think is a reason why this is
7 fairly considered to be a contingent claim and not a sum
8 that is due knowing.

9 I do want to mention the notion that these have to
10 be -- that they have to have taken an action to retain the
11 cards, to come back to us of February 22nd and say the
12 reserves belong to us. I think it's just not the notion
13 that is contemplated by the APA. They say, well it's estate
14 property, so it will --

15 THE COURT: But this is not, again, I think we
16 clarified this -- the debtors are not saying that the
17 reserve account needs to be turned over. This is a
18 crediting mechanism under 10.9 of the APA. The reserve
19 stays where it is. It gets out as it gets worked out. But
20 the crediting mechanism is the only thing that this relates
21 to, under 10.9.

22 MR. LIMAN: Your Honor, if I understand the point
23 correctly, we would agree that the most that the creditors -
24 - sorry, the debtors would get is that if First Data, which
25 has the oldest of the reserves, agrees to release those

1 oldest of the reserves to us, then we have an obligation to
2 turn them over.

3 THE COURT: No, that's not what that -- I don't
4 think -- I mean, that's what I spent a few minutes with the
5 debtor's counsel on. 10.9 says that the amount over \$1.657
6 billion goes to the debtor in the form of the two abilities
7 of the debtor to use the assets. And one of them is the
8 oldest credit card accounts receivables. Not reserve, but
9 the receivables, the oldest ones.

10 MR. LIMAN: They get the right to retain --

11 THE COURT: So you all pay it over, because you've
12 gotten them.

13 MR. LIMAN: No, we haven't gotten them. We don't
14 have them.

15 THE COURT: But it's over -- it doesn't matter
16 whether you've gotten them or not. If the defined term is
17 over \$1.657 billion, then there's this purchase price
18 adjustment.

19 MR. LIMAN: But no, that's not the -- the most
20 that they would get -- assume that these were 360-day-old
21 receivables, right? They're 360-day-old receivables. When
22 we -- a year after the closing, we get paid those -- some
23 portion of those receivables.

24 THE COURT: Right.

25 MR. LIMAN: Maybe we don't get paid any of them.

1 THE COURT: I agree with that. That's what
2 they're entitled to, which explains why this isn't such a
3 big deal as far as transforms credit and everything else,
4 because the reserve is still there. They negotiated a
5 pretty good deal in 10.9 for themselves, which is that the
6 amount above \$1.657 billion, the debtor is entitled to, but
7 it gets it in the two limited ways that that section
8 provides, which are first, transferring inventory that would
9 otherwise be acquired inventory, to a GLB-leased store or a
10 GLB-owned story.

11 And second, retaining as an excluded asset the
12 oldest of any credit card accounts receivable, which you can
13 do as a book adjustment as part of the reconciliation
14 process of the purchase price. So it's not depriving
15 Transform of some sort of its benefit of this security
16 deposit. It's a purchase price adjustment where the
17 purchase price adjustment comes in those two forms in that
18 order.

19 MR. LIMAN: If I understand Your Honor correctly,
20 the inventory's all resolved, and that with respect to the
21 security deposit, it would be an obligation running from us
22 to them once that security deposit is -- those funds are
23 released.

24 THE COURT: No, it's just -- you just credit back
25 to them the amount on the oldest credit card accounts

1 receivable.

2 MR. LIMAN: Once we receive it.

3 THE COURT: No, as part of the purchase price.

4 MR. LIMAN: But it's not -- that's cash out to us.

5 And that's exactly what this was designed not to do.

6 THE COURT: Well, then --

7 MR. LIMAN: I mean, they get the --

8 THE COURT: No one has briefed that issue. But
9 that seems to be the only right that they have is to get
10 that provision enforced. I agree with you, it's not to turn
11 over the money in the reserve account.

12 MR. LIMAN: It's not to turn it over, and I think
13 we have briefed, and I don't think there's any dispute with
14 it, that the most that they would get is the contingent
15 right that if we recover, they recover.

16 THE COURT: Well, I think it's a purchase price
17 adjustment. I don't know how that's made, but that's a
18 separate issue.

19 MR. LIMAN: But it's not designed as a purchase
20 price adjustment. It's not designed as a purchase price
21 adjustment. And I think -- and I may be overstaying my
22 welcome here, and I apologize if I am, but I think in order
23 to give -- the three points I want to leave you with --

24 THE COURT: Well, it's just transferring. You're
25 right. Well it says "retaining," "retaining as an excluded

1 asset." I guess colloquially, that to me would be a
2 purchase price adjustment. They're not selling you those
3 old receivables. They retain it.

4 MR. LIMAN: What they would have had to have done
5 is at the time of closing and before we exercised assumption
6 rights, they would have had to have said something to
7 indicate that they were holding back on it. Just like, Your
8 Honor, if you read the provision with respect to the
9 inventory, what that says is at the time of closing, they
10 need to do something with respect to inventory.

11 We're going -- we're an operating business. To
12 say to us a week and a half after closing, we're retaining
13 something, then we already have a right to assume --

14 THE COURT: Well, but you don't know all the
15 credit card accounts receivables at the closing. You just
16 told me they can't figure it out as of today, what's pre and
17 post.

18 MR. LIMAN: They could make the claim as to --

19 THE COURT: Why do they have to? It's right in
20 the APA.

21 MR. LIMAN: Because what it says in the APA is
22 they have to retain it. They have to retain it. They
23 didn't do anything --

24 THE COURT: They don't have to. It's in the APA.
25 It's (indiscernible). I think this one you're not going to

1 convince me on. I mean, it's not something you know at the
2 closing.

3 MR. LIMAN: Your Honor, I would urge you to look
4 closely at the language of the card agreement. I do think
5 under the restatement and under the integration clause,
6 they're part of the agreement, I think they define what is
7 payable in the ordinary course and what's receivable in the
8 ordinary course.

9 I do think you have to give independent meaning to
10 the notion of "due." I think that does have the meaning of
11 law that says that it is immediately enforceable, it has to
12 be a fixed obligation. It doesn't have to be payable
13 immediately. It can be payable in 20 days, 30 days. It has
14 to be a fixed obligation. And I think their argument fails
15 on those grounds.

16 THE COURT: Okay, thanks.

17 MR. LIMAN: Thank you, Your Honor.

18 MR. FRIEDMANN: Your Honor, if I may just quickly
19 respond and clarify to a couple of the points. First of
20 all, Mr. Liman pointed to the Morrison Lincoln Mercury and
21 said we had no answer and, as we all know, lawyers hate to
22 be told they have no answer so we have an answer which I
23 have to give now.

24 They're pointing to this Eastern District
25 Tennessee case from 1983, which applied completely different

1 facts, a totally different law in determining whether or not
2 a reserve account fell under the definition of account under
3 the UCC.

4 The Delaware UCC applicable here, as you pointed
5 out, defines account as a right to payment of a monetary
6 obligation arising out of the use of credit or charge card.
7 The reserve accounts here clearly represent a right to
8 payment of monetary obligations and, under the definition of
9 the credit card accounts receivable, the key is that these
10 are accounts and the proceeds thereof resulting from those
11 charges. I don't really see how that's a disputable point.

12 The second point I wanted to make is that the
13 withholding of these credit card receivables in reserve
14 accounts does not change the fundamental character of those
15 proceeds. They continue to be credit card transaction
16 proceeds that were now withheld. They were not converted
17 and they ultimately and at all times were owed to Sears.

18 The third point is Mr. Liman was making much of
19 the term "due" in 10.9, but kept inserting the word
20 "immediately". It doesn't say immediately due, it just says
21 due. Due and owed are synonyms. If it said immediately due
22 that might be a different story. That would tie closer to
23 their notion of it being payable, but it just says due.

24 The final thing I just want to clarify in terms of
25 the relief we're seeking here, Your Honor is exactly right

1 and what the mechanisms are after the fact are different,
2 but we're looking to demonstrate that credit card accounts
3 receivable includes the reserve accounts and that therefore
4 there's a credit due to the debtors of \$4.6 million.

5 THE COURT: What is your response to Mr. Liman's
6 argument that because -- well first of all, let me ask you
7 this question. Is the money at issue here held exclusively
8 by First Data or are there other ones too that are holding
9 it?

10 MR. FRIEDMANN: So there are reserves that are
11 held by the other credit card processors as well. My
12 understanding is that First Data is holding approximately
13 \$28 million and change and then the other credit card
14 processors have some smaller amounts.

15 In terms of determining what the oldest are, my
16 understanding is the oldest \$13.3 million, if my number is
17 right, are with First Data. You would then need to go one
18 of the other credit card processors if you're looking for
19 the oldest to get the next whatever that is --

20 THE COURT: All right.

21 MR. FRIEDMANN: One point whatever million.

22 THE COURT: So, Mr. Liman's argument is that the
23 definition of credit card account receivable ends with the
24 clause in each case in the ordinary course of business and
25 his argument is that the reserve established by First Data

1 was not in the ordinary course of business because it was
2 premised upon a more recent fact, which was the lack of
3 availability of the revolving credit facility in this
4 specific amount or higher.

5 So, what is your response to that argument? This
6 isn't in the ordinary course, this deposit.

7 MR. FRIEDMANN: This is something that we
8 addressed in our brief and I think the key here is the term
9 in each case in the ordinary course of its business, what is
10 that modifying? And what it's modifying is the clause that
11 directly precedes it, which is in connection with the sale
12 of goods by a seller or services performed by a seller in
13 each case in the ordinary course.

14 It's describing how these charges came to be that
15 the credit card processor had. So, they're owed --

16 THE COURT: So you're applying the last antecedent
17 rule.

18 MR. FRIEDMANN: Correct.

19 THE COURT: Okay. It doesn't have to be owed by
20 the credit card processor in the ordinary course.

21 MR. FRIEDMANN: It's not owed in the ordinary
22 course. It's owed from proceeds resulting from credit card
23 charges and then the key is that those credit card charges
24 were from the sale of goods or the services performed by the
25 seller in the ordinary course of seller's business.

1 THE COURT: Okay.

2 MR. FRIEDMANN: Thank you, Your Honor.

3 THE COURT: How do you envision this working in
4 practice? You're saying you're above the \$1.657 billion cap
5 right now or amount right now, right?

6 MR. FRIEDMANN: That's correct. My \$14.6 million.

7 THE COURT: Right. Is that it or will there be
8 additional amounts beyond that or is this just based on the
9 reserves that you have now? We know what the reserves are.

10 MR. FRIEDMANN: Based on our understanding, based
11 on the aggregate threshold in 10.9, the \$14.6 is the total
12 amount that we were above.

13 THE COURT: Okay. So then what happens? Because
14 we clarified it's not necessarily to have the reserve
15 released, it's just that you're entitled to the excluded
16 assets or the other assets.

17 MR. FRIEDMANN: To be honest, I think the debtors
18 at this point are flexible in terms of how we get the \$14.6
19 million. If they want to write a check for \$14.6 million,
20 that works. If it's --

21 THE COURT: Or it's between you and the --

22 MR. FRIEDMANN: -- us and First Data and whoever
23 other credit card processors --

24 THE COURT: Or whoever has the oldest one.

25 MR. FRIEDMANN: Correct.

1 THE COURT: And if they still have a right to hold
2 it because of their right, you can contest that.

3 MR. FRIEDMANN: That's something we'd have to work
4 out between us and the credit card processor.

5 THE COURT: All right.

6 MR. FRIEDMANN: I'm sorry, I stand corrected. The
7 \$7 million that we've been referring to where at the time of
8 closing there was this identified \$7 million overage, that
9 was before we knew about the additional credit card
10 proceeds.

11 THE COURT: Right.

12 MR. FRIEDMANN: As I mentioned, the \$7 million,
13 the deal that was agreed to was rather than taking the
14 inventory in transit, we instead agreed to take inventory
15 that was still with the vendor and that was supposed to be
16 shipped to the going out of business stores.

17 That truck has not arrived yet, Your Honor. I
18 don't know how much traffic there was between the vendors
19 and the going out of business stores, but we have not gotten
20 that \$7 million worth of inventory either. So, it's really
21 \$14.6 million of credit card (indiscernible) plus that \$7
22 million in inventory.

23 THE COURT: Okay.

24 MR. LIMAN: Your Honor, if I could just respond to
25 that last point. My understanding is that the debtors have

1 never given any instruction to the vendors with respect to
2 it.

3 THE COURT: On where that's supposed to go?

4 MR. LIMAN: As to where it's supposed to go. The
5 first we heard of a complaint with respect to that was in
6 their papers and I think they, frankly, have -- I understand
7 we've got a lot of balls in the air. This one looks to me
8 that they've dropped.

9 I think, Your Honor, has the point with the \$15
10 million that First Data has agreed to put in escrow. It's
11 not the oldest of the reserves.

12 THE COURT: Right. Okay. All right. I have
13 before me the motion by the debtors in this case to compel
14 turnover of estate property under Section 542 of the
15 Bankruptcy Code. At issue in the motion is the
16 interpretation and application of the asset purchase
17 agreement between the debtors and Transform Hold Co. More
18 specifically, for purposes of this hearing, this ruling
19 without ignoring the rest of the motion which the parties
20 seem to be working through, whether certain reserves held by
21 credit card processing companies constitute credit card
22 accounts receivable, or CCAR, as defined in the asset
23 purchase agreement, of APA, and, in addition, whether if
24 they do in fact constitute credit card accounts receivable,
25 whether Section 10.9 of the APA has been triggered or not,

1 which involves I believe as a contested basis only the issue
2 of whether such credit card accounts receivable and "due" to
3 the seller, i.e., the debtors.

4 I believe that this issue can and should be
5 decided based on the plain meaning of the asset purchase
6 agreement pursuant to APA Section 13.8, the laws of the
7 State of Delaware govern the agreement and construction of
8 contract language under Delaware law is a question of law.
9 Rhone-Poulenc company v. American Motorist Insurance
10 Company, 616 A.2d 1192, 1195, (Del. 1992). The primary
11 consideration in interpreting contract is "to attempt to
12 fulfill to the extent possible the reasonable shared
13 expectations of the parties at the time they contracted."

14 Comrie v. Enterasys Networks Inc., 837 A.2d 1, 13
15 (Del. Ch. 2013) where contract language is clear and
16 unambiguous, under Delaware law the ordinary and usual
17 meaning of the chosen words will generally establish the
18 parties' intent, Matthew v. Laudamiel, 2012 WL 2508572 at
19 page 5 (Del. Ch. June 29, 2012).

20 Courts must be circumspect when considering a
21 contract's language, especially when the contract is between
22 sophisticated commercial entities. Creating ambiguity and
23 ambiguity where none exists could in effect create a new
24 contract with rights, liabilities and duties to which the
25 parties have not assented. Cypress Semiconductor Corp. v

1 SVTC Technologies., LLC, 2012 WL 2989169 at page 4,
2 Del.Super., 2012 June 29, 2012, O'Brien v. Progressive
3 Northern Insurance Company, 785 A.2d 281-288 (Del. 2001).

4 An ambiguity exists when the provisions in
5 controversy are fairly susceptible to or of different
6 interpretations or may have two or more different meanings,
7 GMG Capital Investments, LLC v. Athenian Venture Partners I,
8 L.P. 36 A.3d 776, (Del.Supr., January 03, 2012).

9 Contract language is not ambiguous merely because
10 the parties dispute what it means, Alta Berkeley VI C.V. v.
11 Omneon, Inc., 41 A.3d 381 (Del.Supr., 2012, March 05, 2012).

12 Delaware adheres to the objective theory of
13 contracts under which a contract is construed as it would be
14 understood by an objective reasonable party.

15 The Court, of course, should not interpret a
16 contract provision to yield an asserted result or a result
17 that would render other provisions null, Martin Marietta
18 Materials Inc., v. Vulcan Materials Company 2012 WL 2819464
19 (Del.Supr., May 14, 2012). See also GMG Capital
20 Investments, 36 A.3d 779.

21 But again, based on my review of the parties'
22 agreement, I do not believe that I need to look at parol
23 evidence and that the clear and unambiguous ordinary usual
24 meaning of the words chosen by the parties in their context
25 should govern.

1 APA Section 1.1 defines credit card accounts
2 receivables, "Each Account or Payment Intangible each as
3 defined in the UCC together with all income payments and
4 proceeds that are owed by a credit card payment processor or
5 an issuer of credit cards to a seller", the seller meaning
6 the debtors, "resulting from charges by a customer of the
7 seller on credit cards processed by such processor or issued
8 by such issuer in connection with the sale of goods by a
9 seller of services performed by a seller in each case in the
10 ordinary course of its business."

11 This term becomes relevant for purposes of this
12 dispute because Section 10.9 of the APA entitled Inventory
13 and Receivables provides the following; "The aggregate
14 amount of 1) the inventory value of the acquired inventory,
15 excluding any pending inventories, 2) the amount due to
16 seller in respect to a) the credit card accounts receivable
17 and 3) pharmacy receivables shall be at least \$1.657
18 billion. To the extent that the aggregate amount of items 1
19 through 3 in the foregoing sentence exceeds \$1.657 billion
20 on the closing date, the sellers may reduce such amount to
21 be equal to \$1.657 billion by first, transferring at
22 sellers' expense and in consultation with buyer inventory
23 that would otherwise be acquired inventory to a GOB leased
24 store or a GOB owned store or any other location designated
25 by sellers that is not a property, until the inventory value

1 of the acquired inventory is equal to \$1.553 billion and
2 second, retaining as an excluded asset, that is an asset not
3 purchased by the buyer, the oldest of any credit card
4 accounts receivable or pharmacy receivables."

5 I believe it is undisputed that the \$1.657 billion
6 threshold in Section 10.9 has been met and that there are
7 disputed assets, disputed in the sense that there are credit
8 card accounts receivable were not in excess of that number,
9 the debtors therefore contend that the excess oldest coming
10 first should be treated as an excluded asset and not part of
11 the assets purchased by Transform Hold Co.

12 Transform Hold Co disputes this provision or this
13 interpretation on two grounds. First, it contends that the
14 disputed credit card accounts receivable are not credit card
15 accounts receivable, but are instead covered by a different
16 definition in the APA, namely the definition of a security
17 deposit, which is found in APA Section 2.1(o).

18 That section defines a security deposit as, "Any
19 and all rights to sellers in and to any restricted cash,
20 security deposits, letters of credit, escrow deposits and
21 cash collateral, including cash collateral given to obtain
22 or maintain letters of credit and cash drawn or paid on
23 letters of credit, utility deposits, performance, payment of
24 surety bonds, credits, allowance, prepaid rent or other
25 assets, charges, setoffs, prepaid expenses, other prepaid

1 items and other security, collectively security deposits,
2 together with all contracts, agreements or documents
3 evidencing or related to the same in each case to the extent
4 related to any acquired asset."

5 There is another potential definition that would
6 apply to the disputed credit card accounts receivable here,
7 which is the APA's definition of claim as all rights to
8 payment, which then tracks the Bankruptcy Code definition in
9 1015.

10 I have now had the chance to review all of the
11 credit card servicing agreements under which the disputed
12 credit card accounts receivable are governed and pursuant to
13 which those amounts are being held by the credit card
14 servicers.

15 Those agreements are filed under seal and I will
16 resist quoting extensively from them. Instead I will note
17 merely that based on my review of each of them, including
18 the First Data, AmEx and Discover agreements, there is a
19 common thread whereby each processor or servicer owes or has
20 an obligation to pay the Debtor and in one case aptly is
21 described as a provisional credit for all of the proceeds of
22 the credit card transactions at the Debtors' stores or
23 otherwise with the Debtor.

24 But has the right to setup a reserve account for
25 chargebacks, credits or adjustments, current or anticipated

1 card organization fees or fines in the amount of any fees or
2 discounts due. There is no formal security agreement
3 language in these contracts, but they each recognize that
4 the basis for such reserve amounts ultimately relies upon
5 the right of setoff and/or recoupment.

6 As I previously quoted, a right of setoff is one
7 of the rights that falls within the definition of security
8 deposit and I conclude that accordingly the funds being held
9 legitimately and there's been no dispute that they have been
10 illegitimately held by the credit card processors under
11 their respective reserve right agreements, would constitute
12 security deposits as a defined term under Section 2.1(o) of
13 the APA.

14 Again, the fundamental point being that they're
15 being held pursuant to a right of setoff recognizing that,
16 to the extent that there are no amounts owed over by Sears
17 in the nature of chargebacks, adjustments, fees and the
18 like, they would be owed by the credit card processors to
19 the debtors.

20 My conclusion that the money at issue here
21 constitutes a security deposit does not however lead me to
22 conclude that it is not also a credit card accounts
23 receivable. There is no carveout in the definition of
24 credit card accounts receivable for security deposits and
25 the fact that it would be covered by the defined term

1 security deposit, does not also mean that it wouldn't be
2 covered by the term credit card accounts receivable.

3 That is particularly the case given that the only
4 operative provision we're focusing on here as far as the
5 underlying dispute is 10.9, which itself does not make the
6 distinction or any distinction between credit card accounts
7 receivable and security deposits.

8 So, I believe that having now read all of the
9 relevant provisions of the credit card processing agreement,
10 the argument by Transform Hold Co that the money at issue is
11 a security deposit is a red herring.

12 That still leaves the issue of whether the money
13 does fall within the definition of credit card accounts
14 receivable. Having carefully considered the parties'
15 arguments and reviewed the applicable provisions in the
16 context of the entire agreement, I conclude that the funds
17 at issue are credit card accounts receivable within the
18 meaning of APA Section 1.1.

19 I believe that under the parties' own definition,
20 this money does in fact constitute an account for purposes
21 of the UCC as well as a payment intangible. Delaware's
22 version of the UCC provides in Section 9.1022 that an
23 account means a right to payment of a monetary obligation,
24 whether or not earned by performance.

25 It includes, among other things, in (g) arising

1 out of the use of a credit or charge card or information
2 contained on or for use within the card.

3 Payment intangible in Section 61 of that section
4 of the Delaware UCC means a general intangible under which
5 the account debtors' principal obligation is a monetary
6 obligation.

7 As noted, the credit card processors have a
8 monetary obligation and owe money to the Debtors arising out
9 of their processing of credit cards used by customers of the
10 Debtors.

11 It's clear to me that they owe this money based on
12 my review of the processing agreements themselves which base
13 their right to hold the money on the mutual obligation that
14 the Debtor owes them for chargebacks and future other
15 amounts that would be owed either by nature of setoff or
16 recoupment under the processing agreements, i.e., these
17 reserves are being held on account of amounts owed mutually
18 by both parties to the transaction even though neither party
19 has an immediate payment obligation, hence the use of the
20 term "reserve."

21 Transform Holdco contends that those obligations,
22 and more specifically the mutual obligation owed by the
23 respective processors to the Debtors, is neither one in
24 connection with the sale -- I'm sorry, is not -- is neither
25 resulting from charges by a customer of a seller on credit

1 card processed by such processor or in the ordinary course
2 of the -- of business. On the latter point, it appears that
3 one of the processors, First Data, exercised its right to a
4 reserve based upon a specific triggering fact under Section
5 4.7 of its agreement pertaining to the availability of
6 revolving credit facility in the specified amount.

7 Transform Holdco also argues that the obligation
8 owed by the credit card processor to the Debtor is different
9 from the definition of account that I previously read and
10 does not result from charges by a customer of the Debtors
11 for the use of the credit cards processed by the processor.
12 As to that latter point, I disagree. I believe that the
13 language is more than broad enough in the definition of
14 Section 1.1(a) both in its incorporation of the term
15 "account" and in its use of the phrase "resulting from" to
16 encompass the obligation, albeit not yet -- not necessarily
17 realized on the -- closing it as a due obligation that is
18 due in the sense of immediately due to make payment to the
19 Debtor, but nevertheless, it's a fairly owed obligation to
20 give rise to a right of setoff.

21 And it would ultimately be owed once the customer
22 chargeback and related grounds for setoff were determined,
23 resulting from language obviously on its face is quite broad
24 as is the definition of account in the Delaware UCC that I
25 have previously quoted, namely a right to payment whether or

1 not earned by performance which can rise among other things
2 out of the use of the credit or charged card. That's the
3 entire basis for the relationship between the processors and
4 the Debtor and I believe what was contemplated by this
5 provision.

6 That leaves the issue of the meaning of the phrase
7 at the end of the definition "in each case in the ordinary
8 course of its business." It appears clear to me and as is
9 consistent with the last antecedent rule of interpretation
10 that this phrase refers to the ordinary course of incurrence
11 of the credit card charges in the first place and not any
12 unusual relationship separate and apart from that between
13 the processor and Sears.

14 That leaves the remaining defense raised by
15 Transform Holdco that notwithstanding the inclusion of the
16 reserved security -- the reserved amounts by the credit card
17 processors in the term "security deposit," such amounts are
18 also included within the term "credit card accounts
19 receivable." The operation of Section 10.9 restricts the
20 particular credit cards receivable amounts that go to the
21 \$1.657 billion cap to amounts due to the seller as
22 pertaining to amounts immediately due or actually and
23 presently due and payable to be paid to the seller
24 immediately. Of course, those extra words are not in the
25 phrase. The phrase merely uses the word "due to seller."

1 The plain meaning of this term I believe is on all
2 fours with the term "owed" as opposed to immediately due.
3 And I believe that interpretation is consistent with the
4 definition of credit card accounts receivable and the
5 operation of this provision which I believe requires the
6 parties to look at the credit card accounts receivable with
7 a snapshot which however takes into account information they
8 learn post-closing as to whether they are in fact owed as of
9 the closing date. You would not know that calculus until
10 after the closing date, and I believe that requires one to
11 take into account that they need not be immediately payable
12 but rather simply owing to the seller as of the closing
13 date. I say that in part based on the nature of the
14 adjustment that's laid out in Section 10.9.

15 So in light of that conclusion, I will grant the
16 Debtors' motion insofar as it seeks to implement Section
17 10.9 by including within it all amounts in the respective
18 reserve accounts to the extent that they are not actually
19 applied by the credit card processors appropriately to
20 amounts that Sears owes the processors, again, as of the
21 closing date.

22 So the Debtors can email an order to that effect
23 to chambers. You don't need to formally settle the order on
24 counsel for Transform Holdco, but you should run it by them
25 before you email it to chambers so that they can make sure

1 it's consistent with my ruling.

2 There is a separate aspect of the relief sought by
3 the Debtors for a declaration that Transform Holdco had
4 violated the automatic stay by not causing such funds to be
5 paid over. It appears to me that this issue was complex
6 enough and that the funds in fact were being held by a third
7 party that to the extent there was any violation of the
8 automatic stay, given the prompt resolution of the matter,
9 there should be no damages flowing from it. So I will deny
10 that aspect of the motion on that basis that to the extent
11 there's any violation of the stay, it would not give rise to
12 any independent or separate obligation by Transform Holdco
13 to the Debtors.

14 MR. SCHROCK: Your Honor, Ray Schrock for the
15 Debtors. Just to clarify, there were two other issues
16 raised in the motion to enforce the February rent proration
17 and the cash in transit.

18 THE COURT: Right. But as I understand, the
19 parties are still leaving those open at least for a few
20 days.

21 MR. SCHROCK: Exactly, Your Honor.

22 THE COURT: Okay.

23 MR. SCHROCK: And my --

24 THE COURT: So this is just a partial resolution
25 of the motion, this ruling.

1 MR. SCHROCK: Understood. Just as a matter of
2 procedure to make sure that, you know, we keep these issues
3 open, there were some other issues that were raised by
4 Transform Holdco related to amounts that the Debtors believe
5 are due to them and they believe their ongoing disputes were
6 working through them.

7 And just so that we can be efficient, Your Honor,
8 and make sure that these issues remain in front of the
9 Court, you know, we can always file I know a declaratory
10 judgment action to bring it in front of the Court, but we've
11 got a current motion, you know, to enforce. If the parties
12 can't work these other open issues out that were raised by
13 Transform Holdco and the Debtors, you know, we'd like to
14 have an efficient vehicle to frankly put them up for a
15 hearing under the current motion.

16 THE COURT: I mean you would have to give me
17 papers on them one way or the other because --

18 MR. SCHROCK: Exactly.

19 THE COURT: -- they're new issues. So I leave it
20 up to the parties whether -- I mean you probably ought to
21 just file something new on it --

22 MR. SCHROCK: Okay. Fair enough, Judge. That's
23 what --

24 THE COURT: -- unless it's really an outgrowth of
25 the issues that are covered by this current motion.

1 MR. SCHROCK: No, that's fine, Your Honor. We'll
2 just file something new. And I do want to raise them just
3 because they're -- you know, some of them like for instance,
4 you know, the payment of the \$166 million other payables,
5 they're relevant to -- you know, there's a number of parties
6 that are requesting administrative payments. And so they're
7 fresh so we're going to have to move on them, you know,
8 relatively quickly.

9 THE COURT: Right. Okay.

10 MR. SCHROCK: Thanks very much, Your Honor. I
11 believe the next item on the agenda is Wilmington Trust's
12 motion for related to cash collateral.

13 THE COURT: Okay. Now I've been going for a while
14 now. I'm fine to keep going, but if anyone wants to take a
15 break, they can do it. No? Okay, let's go ahead with that
16 motion then.

17 MR. FOX: Good afternoon, Your Honor. Edward Fox
18 with Seyfarth Shaw on behalf of Wilmington Trust, National
19 Association as Indenture Trustee and Collateral Agent. Your
20 Honor, this is a motion by Wilmington Trust to prohibit or
21 condition the Debtors' continued use of cash collateral.

22 At the outset, I just want to clear up one issue
23 the Debtors have raised in their objection a question about
24 Wilmington Trust's standing. Mr. Schrock contacted me last
25 evening to advise that they were not going to pursue that

1 objection and that they recognize that we are the collateral
2 agent and have standing to make the motion.

3 THE COURT: Okay.

4 MR. SCHROCK: That's correct, Your Honor.

5 THE COURT: But you're not waiving your rights
6 that they may be unsecured or under secured?

7 MR. SCHROCK: That's correct, Your Honor. But I
8 believe that given that they're collateral agent for the
9 entire cap stack over there, we weren't going to frankly
10 waste a lot of time arguing about standing.

11 THE COURT: Okay. That's fine.

12 MR. FOX: Your Honor, the Court entered an order
13 in November of 2018. It's a final order authorizing the
14 Debtors to obtain and get financing in the roll-up DIP of
15 the first lien and also to use cash collateral. And that
16 cash collateral is cash collateral in which the holders of
17 the pre-petition second lien obligations have an interest as
18 it secures their outstanding obligations as well.

19 Under the terms of the order, the Debtors were
20 authorized to use cash collateral subject to and consistent
21 with the terms of the approved budget which was a defined
22 term. And the approved budget was annexed as Exhibit C to
23 the order that was entered. And we included a copy at the
24 end of my declaration as well. That budget, that approved
25 budget carried the Debtors through February 16, 2019 which

1 as it turned out was five days after the closing of the sale
2 substantially but not all of the Debtors' assets.

3 There as far as we know and have been advised
4 there was no extension of that budget, although I'll get to
5 the Debtors have a view about that. But to the extent there
6 was any extension by the DIP ABL lenders, the Debtors would
7 concede that that did not take them beyond March 16th of
8 2019.

9 THE COURT: Well, what the DIP ABL lenders paid
10 out?

11 MR. FOX: Yes, they were.

12 THE COURT: So why would they agree to -- why
13 would they bother to deal with an extension?

14 MR. FOX: Well, we don't believe they ever did.
15 In fact, they told us to the contrary.

16 THE COURT: So why -- because they're paid.

17 MR. FOX: Yes.

18 THE COURT: They shouldn't be spending any more
19 time on the file.

20 MR. FOX: I agree, Your Honor.

21 THE COURT: So why is that extension even
22 relevant?

23 MR. FOX: Well, it's only relevant because the
24 Debtors have raised that as a defense.

25 THE COURT: No. But what I'm saying is you're

1 relying on their not consenting to an extension of the
2 budget, but there's a pretty good reason why they're not
3 consenting, which is they're not paid. That doesn't mean
4 that you somehow have a right to consent.

5 MR. FOX: And we're not suggesting that we do,
6 Your Honor.

7 THE COURT: So but the whole right is theirs. And
8 it's a pretty good reason why they haven't consented.

9 MR. FOX: I understand that, Your Honor, but the
10 order is conditioned -- it limits the Debtors to making
11 expenditures in accordance with that budget. If there's no
12 budget anymore, then there's no right under the order for
13 the Debtors to continue to use cash collateral going
14 forward.

15 THE COURT: So --

16 MR. FOX: Otherwise what we end up with is an
17 order that as the Debtors read it would allow them to do
18 whatever they wish with respect to cash collateral with no
19 limitations whatsoever. And according to them, the second
20 lien which is now the only remaining lien has no ability to
21 have anything to say about what they can or cannot do with
22 that cash collateral. And according to them, it even
23 seemingly prevents us from coming back to the Court to ask
24 the Court to address that issue either by enforcing the
25 order or alternatively under 363(e).

1 So we're in a situation now where as I said, we
2 believe --

3 THE COURT: So I'm sorry. So you're saying that
4 the authority to use cash collateral ended on the payout of
5 the DIP lenders and ABL lenders?

6 MR. FOX: Well, that's effectively what happened
7 because the Debtors' ability to comply with the terms of the
8 order that was entered no longer exists.

9 THE COURT: Is there any disagreement about the
10 use of the cash collateral?

11 MR. FOX: You mean going forward between us?

12 THE COURT: Yes.

13 MR. FOX: We've not had that discussion. The
14 Debtors -- I mean we're open to having that.

15 THE COURT: Well, don't you think you should do
16 that before precipitating a totally unnecessary crisis of
17 this case where the Debtors can't use any cash?

18 MR. FOX: Your Honor, we wrote to the Debtors and
19 asked before filing the motion and asked them to explain the
20 basis on which they continue to believe that they're
21 entitled to spend cash collateral. They responded and said
22 they were entitled to. I spoke with Mr. Schrock before we
23 filed the motion, and we've had conversations since then and
24 there's --

25 THE COURT: All right. Well, maybe the question's

1 addressed to the both of you.

2 MR. FOX: I'm happy to have that --

3 THE COURT: Well, I think you should.

4 MR. FOX: Okay.

5 THE COURT: I could go through this and I will if
6 you want, and I think pretty much come up with the argument
7 that as drafted, neither your argument nor the Debtors'
8 argument makes a whole lot of sense. Normally there's a
9 provision in these that says that, you know, under
10 materially changed circumstances, lenders can come back and
11 dispute the use of cash collateral. Well, that's not in
12 here as far as I can see.

13 On the other hand, to argue that you gave your
14 cash collateral rights up to the DIP and ABL lenders but
15 somehow got them back when they were paid in full, it's a
16 bit of a stretch to just throw the bomb into the case. So I
17 think you all should meet, work through a process, and if
18 you can't do it, I'll decide it because that's really what
19 we're talking about here.

20 MR. FOX: We're happy to do that.

21 THE COURT: Okay.

22 MR. FOX: It takes two to tango.

23 THE COURT: Well, that's true. So you all should
24 start tangoing. Actually, it's three because the Committee
25 would be involved, too. So that'll be an interesting dance,

1 but that's how it works.

2 MR. SCHROCK: Judge, I --

3 THE COURT: And by the way, there's no limitations
4 under 506(c) and 105 either or 552 as far as the -- 506(c),
5 excuse me, on I think on certain parties here. So, you
6 know, we should just get to what's real here which is if you
7 really believe the Debtors are wasting your cash collateral,
8 I understand. If they aren't, then we should just move on
9 to get the case over with.

10 MR. FOX: Our concern is, Your Honor, that there's
11 a limited amount of cash available and but for the previous
12 motion, there's nothing else coming into the estate. So
13 what we're left with is seeing the cash continue to be spent
14 with nothing to replace it but for --

15 THE COURT: Well -- but honestly, what's the
16 alternative? I mean if they can't spend the cash at all,
17 then you're going to be dealing with the Trustee who you're
18 going to be paying. And I guess I could understand why
19 targets of litigation might somehow think that's right,
20 although I imagine the Trustee would hire the same people
21 that analyzed those causes of action over the last few
22 months so that they can file a, you know, 110-page
23 complaint.

24 So I just think the parties should get real here
25 and see where they are as far as a timeline to get out of

1 the case. And I'm not suggesting you're not being real. I
2 understand your point. You see this glitch in the
3 agreement. It's the type of glitch that would drive an
4 indenture trustee crazy. I understand that. Let's just be
5 realistic about it.

6 MR. SCHROCK: And, Your Honor, we're happy to sit
7 down with them. I think the fundamental issue just that is
8 going to be before the parties. So we have been using cash
9 collateral because we believe we're authorized to do so. I
10 think they've raised this issue. We looked at the order as
11 we did, you know, with the closing and we said, listen,
12 we're going to have to sit down obviously at some point to
13 deal with this. I think they want us, some of the second
14 lien parties who don't have rights against the winddown
15 account are looking at the Debtor saying, hey, why don't you
16 use the winddown account proceeds at this point and start to
17 get --

18 THE COURT: Well, I don't know. I mean that --

19 MR. SCHROCK: And so we have to work that out.

20 THE COURT: That comes through very remotely in
21 the papers, but --

22 MR. SCHROCK: Yes.

23 THE COURT: -- those rights are defined.

24 MR. SCHROCK: Yes.

25 THE COURT: And the carveout is defined.

1 MR. SCHROCK: Right.

2 THE COURT: And frankly, the APA which lays out
3 the mechanism for what I think isn't covered by the carveout
4 and the winddown is something that clearly the movant and
5 the parties joining in this motion and the DIP lenders and
6 the ABL lenders were all perfectly fine with. So, you know,
7 I don't know what we're talking about here except maybe
8 trying to get some leverage in the plan negotiation process
9 which isn't going to work.

10 MR. SCHROCK: And, Your Honor, if I could just
11 make a suggestion then. We'll sit down. We'll try and work
12 it out. If we can't we'll contact the Court and --

13 THE COURT: Okay.

14 MR. SCHROCK: -- just have a quick status
15 conference to discuss how to proceed --

16 THE COURT: That's fine.

17 MR. SCHROCK: -- if that's acceptable.

18 MR. FOX: Sure.

19 THE COURT: Okay.

20 MR. FOX: Thank you, Your Honor.

21 THE COURT: Okay.

22 MR. O'NEAL: Sean O'Neal with Cleary Gottlieb on
23 behalf of the ESL. I only stand up just to confirm that
24 we'll be part of those discussions as second lienholders.

25 THE COURT: Well, I don't know. I mean there are

1 specific provisions of the DIP order that deal with ESL.

2 And your colleague behind you for --

3 MR. KRELLER: Cyrus.

4 MR. O'NEAL: Yes.

5 THE COURT: So --

6 MR. O'NEAL: Understood, Your Honor. Though --

7 THE COURT: I mean the indenture trustee is the
8 one with the lien.

9 MR. O'NEAL: Well, also, let's be clear we're
10 talking about the collateral agent which is Bloomington
11 Trust. He's also the indenture trustee for one of the
12 tranches.

13 THE COURT: Look, if they try to --

14 MR. O'NEAL: But ESL does --

15 THE COURT: If they're trying to take something
16 away from your clients, you and Cyrus, yes, absolutely.

17 MR. O'NEAL: Yes.

18 THE COURT: If you want to be involved.

19 MR. O'NEAL: Just to be clear that ESL as a second
20 lienholder does have adequate protection liens and claims.
21 We do have those.

22 THE COURT: Well, there are lots of reserved
23 right.

24 MR. O'NEAL: Yes.

25 THE COURT: That's all I can say.

1 MR. O'NEAL: But we actually have those liens.

2 THE COURT: Right.

3 MR. O'NEAL: And they're in the order and actually
4 discussed in the settlement.

5 THE COURT: You do. And it's to protect for
6 diminution of collateral in the process where ESL became the
7 buyer of the company. So --

8 MR. O'NEAL: Correct, Your Honor.

9 THE COURT: -- you know, let's --

10 MR. O'NEAL: Okay. And I just wanted to --

11 THE COURT: I think that also had -- let's get
12 real here.

13 MR. O'NEAL: Thank you, Your Honor.

14 THE COURT: Okay. I.e, it goes what it wanted.
15 So it's hard to argue with diminished.

16 MR. KRELLER: Your Honor, Thomas Kreller with
17 Milbank, LLP, on behalf of Cyrus Capital. I'll be brief,
18 Your Honor. Just to be clear and for the record, the notion
19 was not that the consent to the use of cash collateral was
20 being withdrawn, thereby leaving the Debtors with no ability
21 to use cash.

22 THE COURT: Right.

23 MR. KRELLER: We're exactly in the scenario, and
24 this is the adequate protection was negotiated this way. We
25 negotiated for adequate protection. We gave consent to cash

1 collateral. The Debtors negotiated for a winddown reserve.
2 If you were to shut off the use of cash collateral, they
3 would turn to their winddown reserve which is if the
4 winddown reserve is not to cover the cost of the case post-
5 closing to plan confirmation, I don't know what else it is
6 for.

7 And if you look at the budget that the Debtors --
8 THE COURT: Well, there's a carveout.

9 MR. KRELLER: There's a --

10 THE COURT: And there are certain -- let me just
11 see.

12 MR. KRELLER: Your Honor, there's actually --

13 THE COURT: There's a -- the waiver of 506(c) I
14 don't think covers your clients. So, again --

15 MR. KRELLER: Your Honor?

16 THE COURT: -- it's not that simple.

17 MR. KRELLER: Your Honor, I'm trying to make a
18 different point. The Debtors attached a budget to their
19 reply where they show a winddown account with \$93 million in
20 it. So I don't think that it's a fair characterization to
21 say the lenders are stepping up, the second lien creditors
22 are stepping up trying to shut the Debtors off of the use of
23 cash collateral. The Debtors have a \$90 million --

24 THE COURT: I'm not --

25 MR. KRELLER: -- winddown budget.

1 THE COURT: I mean I said to Mr. Fox I understand
2 why the collateral agent and indenture trustee brought this
3 motion. But I think that who should be funding this case is
4 not nearly as simple as you posit. The winddown account
5 among other things was meant to take into account and
6 protect against the risk of administrative insolvency, to
7 protect administrative expense creditors, to protect
8 503(b)(9) creditors who have administrative expense claims.
9 It wasn't just to wind down from now going forward. That's
10 a nice name for it, but I believe it was meant to cover more
11 than that. And instead, it wasn't -- we have the 506(c)
12 issues.

13 MR. KRELLER: Understood, Your Honor. I think
14 there's a burden on the 506(c), particularly with respect to
15 my client Cyrus who is not the buyer. But that'll be for
16 another day.

17 THE COURT: Well, it will because I think they're
18 fairly close to each other.

19 MR. KRELLER: Your Honor, we'll make the record
20 clear on that.

21 THE COURT: Okay.

22 MR. KRELLER: We're not an insider. We are not
23 the buyer.

24 THE COURT: Okay.

25 MR. KRELLER: The point is this, Your Honor. The

1 winddown budget, you're right, is there to protect
2 administrative creditors. It's not at the moment protecting
3 super priority administrative creditors. The debtors are
4 marshaling their cash and using cash collateral without
5 consent in a manner designed to allow them to pay
6 administrative expenses, regular way administrative expenses
7 during the case in a case where there may not be cash as
8 when we stand at the confirmation to pay the 507(b) claims.

9 THE COURT: To the extent there are any, but
10 again, you have to look at -- again, that's where 506(c)
11 comes into place. You know, I don't know what the snapshot
12 on the start of the case and the snapshot at the end of the
13 case will look like and whether as was argued to me the sale
14 which the ongoing administrative expenses clearly
15 contributed to the value of actually enhanced the value of
16 your client's collateral. So those are all open issues.

17 MR. KRELLER: Your Honor --

18 THE COURT: It's not that easy to decide in
19 advance and it's probably something that the parties should
20 try to resolve not in terms of doing a budget that specifies
21 exactly where the money is going to come from, or at least
22 leaves open -- let's put it that way. It should leave open
23 reallocation of it. It's fungible in other words.

24 MR. KRELLER: It is fungible, Your Honor, and
25 that's actually a good point. Number one, we've begun that

1 dialogue. In fact, we made a proposal to the Debtors in the
2 beginning of March. We are still awaiting a
3 counterproposal.

4 THE COURT: Okay.

5 MR. KRELLER: And just so to size this for you a
6 bit, we believe Cyrus' position is that our 507(b) claim is
7 in the neighborhood of \$60 million to the point of closing
8 plus then whatever collateral of ours has been dissipated
9 since then in our position without our consent.

10 And, Your Honor, to the extent it's fungible, the
11 other problem that I want to alert you to because I think
12 what you would hear from Mr. Schrock is the DIP order says
13 we don't have a lien on the winddown budget and we can't
14 access that, what that means -- what that doesn't mean is
15 that doesn't override the requirement under 1129(a)(9) that
16 if we have an allowed 507(b) claim, it has to be paid in
17 full.

18 THE COURT: That's true.

19 MR. KRELLER: And so --

20 THE COURT: But the key word there is "if."

21 MR. KRELLER: Absolutely, Your Honor.

22 THE COURT: Okay.

23 MR. KRELLER: But my point is this. What -- the
24 risk that we have is that come plan time, Mr. Schrock stands
25 up and says you don't have any rights to that winddown

1 reserve and there's no other cash to pay our 507(b) claim.
2 I don't think they can override 1129(a)(9) in that fashion,
3 and I expect that's probably something we'll confront if
4 we're unable to resolve this consensually.

5 THE COURT: Well, clearly, I can't confirm a plan
6 unless parties consent. But that's not today's issue, which
7 is why I suggest that when you work out a budget, you leave
8 the issue of allocation to another day which is not that far
9 off. It's like 30 days from now --

10 MR. KRELLER: Your Honor --

11 THE COURT: -- or 60 days from now.

12 MR. KRELLER: -- we'll be happy to do that, to
13 work out a budget. We would have to see a budget and this
14 is the first we've --

15 THE COURT: Sure.

16 MR. KRELLER: And our concern, Your Honor, is Mr.
17 Schrock stands here and says it's a simple waterfall plan.
18 The problem with that is you need water. And it's not clear
19 there's a whole lot of water here.

20 THE COURT: Well, okay.

21 MR. KRELLER: So, Your Honor, we'll work -- and
22 the super priority claims to the extent they exist and are
23 ultimately allowed, are being made to bear that risk.

24 THE COURT: Okay.

25 MR. KRELLER: Thank you, Your Honor.

1 MR. SCHROCK: We'll be happy to sit down, Judge.

2 THE COURT: Okay.

3 MR. SCHROCK: They took all the water, but we're
4 trying to deal with that. Thank you, and we'll be back in
5 touch with the Court if we can't work that out.

6 MR. FRIEDMAN: Your Honor, Jared Friedman, Weil
7 Gotshal, on behalf of the Debtors. The next two agenda
8 items, Number 3 is supposed to be the motion of Debtors to
9 compel turnover of estate property.

10 THE COURT: Yes.

11 MR. FRIEDMAN: And Number 4 is dealing with
12 related issues. It's the motion of the Community Unit
13 School District 300 for relief from the automatic stay or in
14 the alternative for abstention. I spoke to the school
15 district's counsel prior to the hearing today. They
16 requested if it's amenable, the Court is amenable to it to
17 flip the order of those because the motion for stay also
18 includes a request for an abstention, they asked to have
19 that heard first because in the event that they're
20 successful on that, that might moot our motion for turnover.

21 We have no objection if they want to proceed in
22 that order, but we'd leave it to Your Honor to make that
23 determination.

24 THE COURT: Okay. That's fine.

25 MR. FRIEDMAN: It's their motion. I'll turn it

1 over to them.

2 THE COURT: Okay.

3 MR. GENSBURG: Good afternoon, Your Honor. Matt
4 Gensburg on behalf of Community Unit School District 300.
5 Your Honor, I have a number of colleagues. We sort of split
6 the tasks here, so I'd like to introduce a couple of folks
7 to you if I may. I have Alan (indiscernible) is my co-
8 counsel in bankruptcy. I got Ken Florey is municipal law
9 and tax counsel. And Cory Atkinson who's also a municipal
10 law tax counsel.

11 Your Honor, there's really four matters in front
12 of you that all revolve around the same thing or related to
13 the same thing. There's our motion to modify the stay, and
14 in that motion, we also included a request for abstention
15 under 1334(c)(2) and 1334(c)(1). There's a motion of the
16 Debtor to compel turnover under 542. And then there's a
17 related motion to strike the declaration of Mr. Meghji.

18 When you think about the flow of the analysis,
19 Your Honor, we thought it made sense for the Court to
20 consider the 1334(c)(2) matter first, mandatory abstention,
21 because we believe that all those elements are met and if
22 the Court agrees with us, that none of the other issues need
23 to be dealt with today. And so with the Court's indulgence,
24 I'd like to go through our analysis of 1334(c)(2), answer
25 any questions Your Honor may have with respect to that.

1 THE COURT: Okay. Before we start on that, what
2 would the school district get back under the EDA Act if the
3 funds are not distributed to the Debtor?

4 MR. GENSBURG: So the school district, Your Honor,
5 is the largest taxing district involved. We would get 60
6 percent of that.

7 THE COURT: Okay. All right.

8 MR. GENSBURG: So, Your Honor, I'm going to start
9 with 1334(c)(2) which states basically that the Court must
10 abstain from the proceeding if six prerequisites are
11 satisfied. Those prerequisites are timely motion has been
12 made, the proceeding is based on state law claim or state
13 law cause of action, the proceeding is related to a case
14 under Title 11, the proceeding does not arise under or arise
15 in a case under Title 11. But absent jurisdiction under
16 1334, there would be no federal jurisdiction here at all
17 over this matter entitling adjudication of the Court
18 original jurisdiction.

19 Every one of those elements are met. So let's
20 take each one. First, timely motion. We filed our motion
21 to modify the stay and our request for abstention on
22 November 12th of 2018. You might recall, Your Honor, I'm
23 sure you read all the pleadings --

24 THE COURT: No, I don't have an issue on your
25 client's timeliness.

1 MR. GENSBURG: I'm sorry, sir.

2 THE COURT: I don't have an issue on that point.

3 MR. GENSBURG: Okay. We'll go on. State law, I
4 don't think anyone's disputing that the matters at issue
5 right now between Sears and the school district involves
6 exclusively issues of state law and state law claims causes
7 of action. This involves the Illinois EDA Act. It's a
8 unique Illinois legislation, also involves an economic
9 development agreement entered into by Sears in 1990 which
10 implemented the Illinois EDA Act.

11 When you look at the briefs, a large portion of
12 the briefs are just voided to try and interpret this
13 legislation. And, you know, we filed our action, the
14 Illinois action pre-petition. If this case were to go away
15 and were to be dismissed for some reason or had never been
16 filed, this would still be out here as an issue. It would
17 be resolved in the state court where the matter was
18 originally filed. I don't think anyone's disputing the fact
19 that this is a state law issue.

20 THE COURT: Well, the Debtors contend -- and if
21 they're right on the facts, I think they're right on the
22 law, that to get there, you have to make it -- I'll have to
23 conclude that it is a real issue, a difficult issue of state
24 law. There has to be a limit, in other words, to the
25 argument that a non-debtor third party doesn't have to turn

1 over property, doesn't have to perform an agreement or
2 otherwise exercise control over property of the estate and
3 force a debtor to go pursue its rights in some other forum.

4 MR. GENSBURG: Actually, Your Honor, I think in
5 the way you framed it, you jumped a couple of steps forward
6 because that's not what it is. The question here is whether
7 Sears complied with the terms of the Illinois EDA Act.

8 THE COURT: I know, but if the -- I'm not -- I
9 don't have a view on this yet. But if the answer to that is
10 yes, clearly, this is a no-brainer, then it really isn't an
11 issue guided by state law because it's not an issue.

12 MR. GENSBURG: Well, right. And it's sort of --
13 it gets a little circular here.

14 THE COURT: Well, it doesn't because Congress
15 clearly did not mean that any party to which a debtor has
16 some dispute with can force the debtor to pursue it
17 notwithstanding the automatic stay, notwithstanding 542 in a
18 state court where it's perfectly clear that there really
19 isn't a dispute. There's no real dispute.

20 MR. GENSBURG: Your Honor, on that point, I guess
21 you and I are not going to disagree.

22 THE COURT: Okay.

23 MR. GENSBURG: Because clearly what you're talking
24 about is 542. And we all know the case law under 542. 542
25 is meant to bring into property that's already undisputed

1 property of the estate.

2 THE COURT: Well, you can't just raise your hand
3 and say I dispute. It has to be a real dispute.

4 MR. GENSBURG: Oh, absolutely.

5 THE COURT: Okay.

6 MR. GENSBURG: Absolutely. And that's what the
7 cases say. You know, they use -- you know, and you look at
8 the verbiage in the cases and you see some cases say
9 frivolous. It refers to frivolous dispute and not
10 legitimate dispute, not bona fide, not substantial. And I
11 understand that. And what the Debtors can convince Your
12 Honor is that this matter is not a bona fide dispute so that
13 it is under 542, then I think it's correct and falls within
14 the confines and it is in fact a core proceeding.

15 But, you know, the Supreme Court talked about this
16 a long time ago in Northern Pipeline. In Northern Pipeline,
17 you'll recall is a breach of contract action, and the
18 contract would have augmented the estate. And what the
19 Court did is it made a clear distinction between public
20 rights which govern Article I courts and private rights.
21 And what we have here, we have a contract and we have a
22 question. You know, did Sears comply with the terms of the
23 contract or did not comply with the terms of the contract?

24 And it gets a little more complicated because
25 within that question, there's a question of, all right, what

1 year's relevant. Sears says 2017. We think it's 2018. And
2 then it gets even more complicated by saying, well, do you
3 count tenants and contractor employees or do you limit it
4 just to Sears employees. And then you add on top of that
5 the third issue is even if they're right about 2017-2018
6 issue and even if you determine that they're entitled to
7 count tenants and contractors, when you count those tenants
8 and contractors, do they meet the limit. Well, those are
9 all the issues --

10 THE COURT: I'm sorry. When you say there's a
11 factual issue, even if you count the tenants and the
12 contractors?

13 MR. GENSBURG: There is.

14 THE COURT: Okay.

15 MR. GENSBURG: There is and which drove our motion
16 to strike to a certain extent. And so I guess, Your Honor,
17 I'm not debating the fact that if you -- and that's why I
18 have Mr. Florey here. If Your Honor's going to tell me
19 that, counsel, this is as clear as day. This legislation
20 that's not the epitome of clarity is clear as day. You're a
21 loser. I can see it. That's sort of a 12(b)(6) argument.

22 In CIL, that's exactly how the court dealt with
23 it. The court dealt with this turnover issue by treating it
24 almost like a 12(b)(6) issue had they stated a plausible
25 claim.

1 THE COURT: Right.

2 MR. GENSBURG: I tried to figure out because when
3 you look at the decisions, the courts really don't explain,
4 well, how do you know --

5 THE COURT: That's a fair analogy.

6 MR. GENSBURG: And but there's other analogies
7 that even may be closer. You know, under 303 of the
8 Bankruptcy Code involuntary, if you're a petitioning
9 creditor, you have to have a (indiscernible) subject to bona
10 fide dispute. And so when Your Honor is dealing with are
11 there appropriate creditors here and one of the questions
12 you're asking I assume depending on the facts that arise, is
13 this a bona fide dispute. This is the same issue to a
14 certain extent.

15 THE COURT: No, that case law is very different
16 because of the policy against involuntaries. But go ahead.

17 MR. GENSBURG: Okay.

18 THE COURT: It's okay.

19 MR. GENSBURG: But where it gets a little -- in my
20 mind, a little unclear is -- and I get the impression Sears
21 is suggesting that you should actually resolve the dispute
22 to determine whether it's a bona fide dispute. And that I
23 think would be inappropriate. I don't think that's -- that
24 would just basically say, well, Northern Pipeline is
25 irrelevant. You need to determine, look at the facts and

1 determine whether there's really a dispute here. And if
2 there is really a dispute here and this is the only basis
3 for them having jurisdiction, then the Court must abstain,
4 assuming that we've --

5 THE COURT: Well --

6 MR. GENSBURG: -- convinced you with respect to
7 the other elements of 1334(c)(2).

8 THE COURT: Right. Okay.

9 MR. GENSBURG: So if that's where we're going and
10 whether there's a bona fide dispute and all the other
11 elements of 1334(c)(2) have been conceded, then --

12 THE COURT: Well, I'm not sure they are. Will the
13 pending Illinois action result in a timely adjudication?

14 MR. GENSBURG: I believe it will, Your Honor.
15 And so let me address that. So first of all, there's a --
16 you know, AOG Entertainment from this district dealt with
17 that issue. And basically what that court says is it stated
18 that out of deference for -- to the paramount interest of
19 another sovereign and out of respect for principles of
20 comity and federalism, "Absent contrary evidence, a federal
21 court must presume that the state court will operate
22 efficiently and effectively in adjudicating the matters
23 before it."

24 And then another case from this district,
25 (indiscernible) Capital basically says that the burden

1 should be on the Debtor to prove that the state cannot
2 adjudicate claims in a timely manner. And, Your Honor, they
3 simply have not met their burden. What the Debtors say in
4 their briefs is they say, well, Your Honor, can do it
5 faster. Well, when I go on, I'll explain why --

6 THE COURT: Just tell me what your projected
7 timeline is on this.

8 MR. GENSBURG: Right now, Your Honor -- well, I
9 guess this should be if it's a straightforward as their
10 counsel suggests and it can be cited as a matter of law and
11 not as a -- I think this could be resolved in 30 to 60 days.
12 It's already pending before the Court. They got stayed and
13 motion for injunctive relief.

14 THE COURT: By?

15 MR. GENSBURG: I'm sorry, Your Honor.

16 THE COURT: That motion by whom for injunctive
17 relief?

18 MR. GENSBURG: By the school district. And it was
19 going to be -- it was set for argument and the bankruptcy
20 got filed and they stopped it. If in fact this issue --

21 THE COURT: And I'm sorry, that's to enjoin the
22 town from paying the money over?

23 MR. GENSBURG: Yes, sir.

24 THE COURT: Okay.

25 MR. GENSBURG: And issues -- and that's basically

1 the issue, right. The issue is don't pay it if they don't
2 meet the prerequisites. The Debtors stated that this is a
3 straightforward issue. I get the impression they believe
4 that this Court can decide or any court can decide as a
5 matter of law. There's no reason to believe if that's true
6 that that's can't be decided in 30 to 60 days in Illinois.
7 They certainly know how to do it.

8 And the statistics that I attached to our response
9 say, you know, 81 percent of the cases, civil motions filed
10 in Cook County now are resolved in 30 days. So --

11 THE COURT: Well, I would really like something
12 more specific on this case. You know, a lot of the motions
13 filed in Cook Count involve cars. So can you or one of your
14 colleagues tell me their projection of the timeline of this
15 case? I mean obviously an injunction would not -- it would
16 give the parties a good idea what the Court believes the
17 merits -- where the merits go, but it wouldn't decide the
18 issues.

19 So I'm trying to -- I'm really trying to -- look,
20 the reason I'm saying this is this is not a two- or three-
21 year case. This is a case where the Debtors have reduced
22 their hard assets to cash. Their obligations and that cash
23 -- I'm sorry, their administrative expense obligations and
24 that cash are very close to each other, so time is really
25 important. And any extra cash is really important.

1 Now they may have all sorts of litigations claims,
2 but those won't be realized for a long time and you can't
3 use those to fund the payment of administrative expenses
4 under a plan unless the administrative expense creditors
5 consent. So resolving this case promptly is really
6 important. And I think what Congress drafted or -- yes,
7 when Congress or the Supreme Court drafted these provisions,
8 when they used the word "timely," they wanted to take --
9 they wanted the bankruptcy court to take into account the
10 effect of the state court litigation on the bankruptcy case.

11 So what is your best --

12 MR. GENSBURG: And what I'll do, Your Honor --

13 THE COURT: Just what is your best estimate and
14 why of the likely -- I understand if there's going to be a
15 trial, that's a different issue. You know, if there's going
16 to be a trial on whether even counting the third parties who
17 work at the site or worked at the site, that will take
18 months longer. But just on a motion to dismiss type of
19 standard on either the 2017 versus 2018 and/or it has to be
20 Sears as opposed to Sears past people who worked there,
21 what's your best estimate of --

22 MR. GENSBURG: Let me allow Mr. Florey --

23 THE COURT: Okay.

24 MR. FLOREY: Good morning, Judge. Ken Florey from
25 Robin Schwartz on behalf of the School District 300. Judge,

1 the state court case is still active pending the ruling from
2 this Court on the automatic stay. And Cook County is used
3 to dealing with expedited cases. There are election cases
4 that when there's a need for a quicker briefing schedule for
5 rulings and issues of the law, the courts are cooperative in
6 doing that. That's exactly what we would be doing.

7 If you give us the relief, if you abstain and
8 we're back in the state court, we'll be filing motions next
9 week. We'll get a hearing on the temporary restraining
10 order to be followed by a motion for summary judgment on the
11 issues of law. And if counsel's right, there are not many
12 disputed fact issues, we could get a ruling very quickly.
13 We would be going under expedited briefing schedule. We
14 would have it briefed. You can expect the ruling within 30
15 to 60 days.

16 THE COURT: Of the abstention or of the filing the
17 motion?

18 MR. FLOREY: From tomorrow.

19 THE COURT: Okay. And it would seem to me that
20 your client would really want the money, right? You
21 wouldn't be delaying the process knowing that there would be
22 some leverage on the Debtor if you did that?

23 MR. FLOREY: Judge, this money will be going
24 towards -- first of all, the school district is 21
25 buildings. There's --

1 THE COURT: No, I'm sorry. I didn't -- it wasn't
2 clear. Would you undertake not to delay the process?

3 MR. FLOREY: We want the money tomorrow. We need
4 the money for --

5 THE COURT: All right.

6 MR. FLOREY: -- security measures to secure our
7 schools.

8 THE COURT: So the answer to my question is yes,
9 you won't delay the process?

10 MR. FLOREY: Yes, absolutely.

11 THE COURT: Okay.

12 MR. FLOREY: The money is -- the time of this
13 money is critical.

14 THE COURT: Okay. So why don't I hear from your
15 colleague then.

16 MR. GENSBURG: On that point, Your Honor, I just
17 want to make one other point with respect to this Court. If
18 I'm right, I think I am, that this matter is related to --
19 it's clearly related to -- but it's not core, then what we
20 ought to keep in mind is what's going to have to happen.
21 Your Honor's going to make findings of fact and conclusions
22 of law and that's got to be sent up to the district court to
23 consider.

24 The only way we avoid that is if Your Honor
25 determines that this is in fact court and I don't know how

1 --

2 THE COURT: Well, we're back to the 12(b)(6) type
3 of point.

4 MR. GENSBURG: Yes, we are.

5 THE COURT: Okay.

6 MR. GENSBURG: And so I think in summary, Your
7 Honor, with respect to 1334(c)(2), it sounds like those are
8 the only two issues. You got us into the time frame. The
9 school district, we filed this motion in November because we
10 needed the money. We still need the money even more. So we
11 have every incentive to get this done promptly.

12 And then the real question, Your Honor, is whether
13 this is -- the dispute is functionally frivolous or not bona
14 fide or -- and I wish I could find a case that actually
15 defined what does it mean not to be bona fide. And that's
16 why I went to 303 because 303 actually uses the word "bona
17 fide." And I was trying to find something similar to that
18 and you just don't find in the case law. What you find is
19 cases that say, you know, for example, one decision in which
20 they argue that they didn't owe the money and there was a
21 dispute but the Court looked at the defense, I forget what
22 it was, and it said there's no possibility under this
23 agreement that that defense has any validity at all. And
24 that's I think the Court that said it was frivolous. That's
25 not where we are.

1 And so, I guess in trying to figure out what the
2 appropriate step is at this point, if Your Honor wants, I
3 can give it back to Mr. Florey. Mr. Florey can explain to
4 you his analysis with respect to the statute, both the
5 years, you know, which year's applicable. He could explain
6 to Your Honor the school district's analysis with respect to
7 can you count tenants and contractors or not because the
8 statute's not really clear on this point. And then we can
9 deal with the issue of even if you can do all of that,
10 whether Sears up to this point has actually proven the
11 elements of the number of tenants that worked, full-time
12 equivalent tenants and number of contractors that were full-
13 time equivalent contractors because we have problems with
14 that. And that's the motion to strike.

15 So, Your Honor, you know, I guess I ask the Court
16 to suggest how you'd like us to proceed.

17 THE COURT: What is your proof on the latter
18 point? What is your evidence on the -- that the third
19 parties don't add up to the number of -- the number in the
20 EDA along with Sears?

21 MR. GENSBURG: Well, so our problem with that
22 point which led to our motion to strike is that we don't
23 know how and Mr. Meghji doesn't know how it was calculated.
24 So --

25 THE COURT: Okay. So let's say you don't need to

1 present evidence on that because you just would cross-
2 examine him.

3 MR. GENSBURG: Well --

4 THE COURT: And depose him, of course. We take
5 discovery on that.

6 MR. GENSBURG: We sent him a notice of deposition
7 and we sent Sears a 30(b)(6) notice.

8 THE COURT: Right.

9 MR. GENSBURG: And he came and we asked that
10 question and he refers to a methodology, but he didn't what
11 it was. And think about this.

12 THE COURT: So, no, I'm sorry. I understand your
13 point which is this isn't an evidentiary hearing and you
14 want to develop the record on that point.

15 MR. GENSBURG: And some of the tenants, Your
16 Honor, (indiscernible) Sbarro.

17 THE COURT: I'm sorry.

18 MR. GENSBURG: Sbarro, you know, the authentic
19 Italian --

20 THE COURT: Pizza?

21 MR. GENSBURG: Yeah.

22 THE COURT: Right.

23 MR. GENSBURG: And I would suggest it would be
24 like, you know, Walmart that very few of their employees are
25 full-time equivalent employees in that everyone's part-time

1 so you don't have to give them benefits. But I don't -- I
2 have no idea how they calculated their numbers. And I don't
3 think Mr. Meghji knows. I can guarantee you he doesn't know
4 because he didn't tell us. We asked him the question. And
5 that's an important fact assuming we even get to that point.

6 THE COURT: Right. Okay.

7 MR. GANSBURG: So, Your Honor, I guess -- would
8 you like Mr. Florey to walk you through --

9 THE COURT: Yes.

10 MR. GANSBURG: Yes.

11 MR. FLOREY: Judge, a little background on Civil
12 District 300. The school district has 21,000 students with
13 27,000 school buildings, and it is heavily reliant on
14 commercial property taxes.

15 THE COURT: But can I just interrupt you for a
16 second?

17 MR. FLOREY: Sure, Judge.

18 THE COURT: This subsidy has been going on for a
19 while, right? I mean, they had to have budgeted, I would
20 think, on the assumption that it would be paid again, right?

21 MR. FLOREY: Every year this subsidy exists, the
22 costs grow. With Illinois, there's a --

23 THE COURT: Well, of course, that's a given with
24 schools. But what I'm saying is it's not as if they built
25 into their budget getting this money. It's a windfall,

1 right?

2 MR. FLOREY: It is not a windfall, Judge.

3 THE COURT: Well, all right.

4 MR. FLOREY: It's not a windfall. They've been
5 disputing this. They've been demanding proof of compliance
6 since Sears realized it breached the agreement with the
7 state. There are two subsidy agreements in place for the
8 facility, state subsidy-based income taxes, and the local
9 subsidy based on property taxes.

10 In Illinois, school districts are heavily
11 dependent for operations on commercial property taxes. The
12 resident come in, they build houses, they create kids. Each
13 kid is roughly \$12,000. You have two kids, that's \$24,000.
14 You're going to get maybe four, five, six thousand dollars
15 on that house. You're running a deficit for every single
16 house that is built.

17 Well, since Sears came in and built their facility
18 and homes grew, our burden just kept building and building
19 for funding the education of these students. We're below
20 the state average. We're at over 40 percent property --

21 THE COURT: All right. My only point is that's
22 arguing that the statute was a mistake in the first place.
23 I don't think... It doesn't do any good with me to argue
24 that it would be nice for the school district to have the
25 money because it's a tautology. I don't think there's

1 anything as far as beyond that.

2 MR. FLOREY: But the statute does have recapture
3 provisions.

4 THE COURT: Right.

5 MR. FLOREY: And it was amended in --

6 THE COURT: That's fair. I understand that.

7 MR. FLOREY: -- in 2012.

8 THE COURT: I understand that.

9 MR. FLOREY: Remanded in 2012. There was a
10 question and a doubt about whether Sears would comply with
11 the 4,250-employee requirement.

12 THE COURT: Right.

13 MR. FLOREY: So, the recapture provision was
14 specifically -- went into both statutes, the state statute
15 and the local statute, to recover the funds. And we're at
16 that point. We're at the point that the school district has
17 been carefully monitoring since 2016. They were dropping
18 employees like flies and were at that point where they
19 dropped below the 4,250 for the state statute, and similarly
20 they dropped below the 4,250 in the local statute.

21 Now the recapture provision has kicked in. We're
22 in the position to be able to assert the recovery of those
23 dollars. It's been -- it's desperately needed in the school
24 district. You're talking about employees. You've asked if
25 we budgeted for it. They're running at a deficit as far as

1 education funding for their district. This is necessary
2 money, Judge.

3 All right. If you look to the statute, you're
4 talking about what we've talked about repeatedly. What are
5 the relevant numbers, Judge? What are the relevant -- what
6 do we look to for the account for the employees?

7 Clearly, when you only count Sears employees,
8 there's -- it's undisputed, they fail on that regard. They
9 dropped below the 4,250 at least in early 2017, if not
10 earlier. So, then Sears came up with the novel argument
11 that we're going to change the year of how we're accounting.

12 The Village, in 2017, asked for a certification
13 from Sears. Are you in compliance with the jobs requirement
14 for 2017 data? They provided that answer with 2017 data.

15 In 2018, the Village submitted a similar
16 (indiscernible). Are you in compliance with the jobs count
17 for 2018, using 2018 data? Sears response was, we're going
18 to use 2017 data. We're going to count the data we want to
19 use twice, even though in that year there were all
20 indications that failed to comply with that, based on only
21 counting their own employees.

22 THE COURT: So, the first issue is the year issue?

23 MR. FLOREY: The year. Which year's data are we
24 using?

25 THE COURT: Okay.

1 MR. FLOREY: The statute talks about that. And
2 Cook County taxation, I could put you to sleep with an
3 explanation of how that works. But the critical terms are
4 levy taxes, levy new taxes paid. The statute -- the EDA Act
5 talks about using the -- to satisfy the subsidy requirement
6 of 4,250 employees, you use the data from the year the taxes
7 are paid. They didn't use the year the taxes are levied.

8 Sears' argument requires you to go back to a prior
9 year for the levy. There's no term of levy in the EDA Act,
10 only paid, and it's used multiple times, as recited in our
11 brief. So, based on that, just --

12 THE COURT: Although they say that in practice
13 that's what the parties did.

14 MR. FLOREY: No, just the opposite.

15 THE COURT: You disagree with that?

16 MR. FLOREY: Look at the documentation from the
17 Village. The Village asks for 2017, provide us 2017. For
18 2018, provide us 2018 data. Sears did it in 2017, as
19 requested. Sears started playing games and 2018 when they
20 realized they can't hit numbers. Then they decided, we'll
21 just change the year, despite the practice, despite the
22 clear language in the statute.

23 And then when that didn't work, they said, we're
24 going to change the count. We're going to now start --
25 we've never counted contractor employees; we've never

1 counted tenants. We'll even count employers that are miles
2 away from the campus. But in theory, have some economic
3 development of Sears.

4 It continues to be a stretch for Sears to try to
5 demonstrate that they complied with the statute and then the
6 recapture provisions do not kick in.

7 THE COURT: Okay.

8 MR. FLOREY: So, the 2018, in our view, the
9 statute is clear, the past practice is clear; you need to be
10 using the 2018 data, not the 2017 data. And then we get
11 into the employee count.

12 The statute talks about the developer. And the
13 developer is not tied into Sears, but it has characteristics
14 that Sears is the only company that does comply. It does
15 not talk about the developer and its contractors and its
16 third-party employers, or any other employers. None of
17 which these employers receive any tax subsidies.

18 So, to claim that you can -- the burden of them
19 and those other entities employing people without any
20 benefit of a subsidy is a ridiculous interpretation of the
21 statute.

22 The statute talks about the development agreement.
23 It's much more specific and talks specifically about Sears
24 as the developer and having to create, retain and maintain
25 4,250 jobs.

1 Let's talk about the state statute, because it's
2 important, and these words that are in both the EDA Act, the
3 local statute and the state statute. They use create,
4 retain and maintain. Maintain is a critical word, Judge.

5 Maintain is the word used in the recapture
6 provision. If Sears doesn't maintain 4,250 jobs, it loses
7 the subsidy. Under the state statute, that's the exact term
8 that's used. And if you're going to go outside the
9 statutory language, as Sears wants you to do, and look to
10 other statutes, cardinal rule of statutory construction, you
11 look to similar statutes with similar terms to get your
12 answer. Maintain under the state statute, meant Sears
13 maintained the employees.

14 THE COURT: And what is your authority for that?

15 MR. FLOREY: The authority for just counting the
16 Sears employees?

17 THE COURT: Yeah, that maintain means employ.

18 MR. FLOREY: Because that's how Sears settled with
19 the state, saying, we did not -- Sears, as an entity alone,
20 did not maintain 4,250 employees. So, under the state
21 statute, which is the same target of employee count, similar
22 subject, the maintain is, was, and been interpreted by both
23 parties to mean Sears employees. So, that same word is used
24 --

25 THE COURT: In --

1 MR. FLOREY: -- in the recapture provision.

2 THE COURT: In what context, though?

3 MR. FLOREY: The same context.

4 THE COURT: No.

5 MR. FLOREY: The context of providing the
6 employees for the economic development.

7 THE COURT: But -- I'm not being clear. It's not
8 a judicial decision.

9 MR. FLOREY: It is not a judicial decision;
10 correct.

11 THE COURT: It is reflected in what?

12 MR. FLOREY: It's reflected in the statute, how
13 it's been interpreted by the agency that -- the Department
14 of Economic Development is a state agency created to process
15 that statute. That was the party that Sears (indiscernible)
16 was saying we did not reply with the jobs requirement. The
17 state agency's interpretation of the statute are given a
18 high amount of deference in Illinois, as in most
19 jurisdictions. The conduct of the parties using the Sears
20 employees only for the two --

21 THE COURT: As part of the settlement, though.

22 MR. FLOREY: It was a point of --

23 THE COURT: As part of the settlement?

24 MR. FLOREY: Correct.

25 THE COURT: Okay.

1 MR. FLOREY: So, when you take the word maintain
2 that's used in both statutes, clearly, you're talking about
3 Sears employees only. If the General Assembly of the
4 Illinois Legislature sought to expand Sears ability to count
5 other employers, you would have had language, express
6 language to do that. In Illinois, as within most municipal
7 jurisdictions, you must have express statutory language to
8 authorize any type of conduct you're going to engage in.

9 THE COURT: I'm sorry. The statute you're relying
10 on was enacted before or after that settlement?

11 MR. FLOREY: Prior to the settlement. They were
12 both amended in 2012 --

13 THE COURT: Okay.

14 MR. FLOREY: -- to extend Sears' state and local
15 subsidies for another 15 years.

16 THE COURT: Okay.

17 MR. FLOREY: So, you get past the 2018, 2017
18 issue. If we're correct, Sears is -- they lose. They lose.
19 They don't come in compliance. If you get to the employee
20 count issue, based on the statutory language, based on the
21 interpretation of how the state is interpreted, and most
22 importantly based on the legislative history, which we have
23 included in our documents.

24 Interesting, very critical debate of the sponsor
25 of the bill, the legislative history for our statute, before

1 the EDA Act, the question was raised. What if Sears drops
2 out its employees -- and they had the presence of mind to
3 ask this question in 2012 -- what if Sears has rough times,
4 drops out its employees, goes to a lower count, couple
5 hundred employees below the 4,250 number, and they have a
6 skeletal crew operating there? Do they still receive the
7 subsidy?

8 The sponsor of the bill said the intention of this
9 statute is no. If they drop to that level, they lose the
10 subsidy. That's a clear indication of the legislative
11 intent, do you count other employees? The sponsor could
12 have said, well, representative, you can also -- Sears is
13 going -- there's going to be other employers still. There's
14 going to be -- because it's not just a Sears campus.

15 There could be another company that comes in here
16 and starts to lease the space with thousands of employees.
17 They didn't say because its Sears as original economic
18 development, they were going to continue to proceed with the
19 subsidy, even though they're still there, still in
20 existence, still operating on the campus.

21 That's critical that the General Assembly did not
22 intend Sears to count anyone but its own employees. You
23 have the burden of the employees. That's the only way you
24 can receive the benefit of the subsidy.

25 So, based on the clear language of the EDA Act,

1 the development agreement which talks about Sears
2 maintaining the 4,250 jobs, the practice of the parties, the
3 legislative history, it's clear that only Sears employees
4 are counted, for the same reasons it's clear that the year
5 taxes are paid is the applicable year.

6 And if you get through all those levels, if you
7 still disagree with us, as counsel said, they have no idea
8 whether the numbers that they've presented, the documents
9 they've presented as contractor employees, tenant employees,
10 are liable numbers. They haven't even provided a list of
11 the names of the tenants, the names of the contractors.
12 It's just a term on their spreadsheet. They didn't -- it'd
13 be very simple to say these are our tenants, Sbarro, dry
14 cleaners, Dunkin' Donuts --

15 THE COURT: Right. And --

16 MR. FLOREY: -- whoever they are.

17 THE COURT: And the argument being made is that
18 Mr. Meghji wasn't fully informed so he couldn't be a 30 (b)6
19 witness on that issue.

20 MR. FLOREY: He didn't even need to -- they just
21 need to produce documentation, give us a -- I'm assuming
22 they have leases. Give us copies of the lease, give us a
23 list of the leases and the parties. Who are your
24 contractors? Who are you counting? Who are the businesses?

25 If you can't even provide the names of the

1 tenants, the names of the contractors, the names of these
2 other entities, how can you count for employees?

3 If you can't explain why we've -- and the term,
4 the second (indiscernible) Misty Redman, she said -- she
5 testified that the document they were relying on, Exhibit
6 13, hasn't been scrubbed. She called it scrubbed. No one
7 has gone through and removed part-time employees.

8 So, they're relying on an unscrubbed -- using
9 their terminology -- document to attempt to demonstrate to
10 this Court that you get through all others hoops about can
11 we count these obscure employees that we have no identity --
12 we don't identify the employers, we don't identify the
13 employees, where they're only verifying whether they're
14 full-time or part-time or anytime.

15 Any way you look at this, Judge, there is no basis
16 in fact or law to grant their motion to compel. To the
17 contrary, the arguments that we raise in opposition to that,
18 as well as the demonstration of the bona fide dispute, it's
19 pretty clear that exists, as counsel has argued. And I'll
20 leave the rest to the abstention argument.

21 THE COURT: Okay. Thanks.

22 MR. GANSBURG: Your Honor, at this stage, I think
23 it's probably appropriate, unless you have more questions
24 for me, to hand it over to Mr. Friedmann.

25 THE COURT: Okay. That's fine.

1 MR. FRIEDMANN: Your Honor, Jared Friedmann, Weil
2 Gotschal & Manges, on behalf of the Debtors. All right. I'm
3 not even sure where to start.

4 Okay. So, beginning with the fact that for a
5 mandatory abstention, all of our requirements need to be
6 addressed and they need to be met by the movant seeking
7 abstention here.

8 The issues here are clearly fundamental core
9 issues. We're talking about property of the estate. Now,
10 there --

11 THE COURT: Well, no, it hasn't been decided yet -
12 -

13 MR. FRIEDMANN: Well --

14 THE COURT: -- that they can't be released.

15 MR. FRIEDMANN: -- the Illinois action that they
16 want to pursue -- so this is a motion for -- it was a motion
17 for stay and also a motion for abstention, so the issues are
18 a little bit conflated.

19 But the -- when he's talking about the injunction
20 that's been filed and the complaint that's been filed, it
21 doesn't just involve the amounts in our motion for turnover,
22 which are the 2017 funds. It also seeks to recoup funds
23 that were paid in 2016 and 2015, and I don't know how many
24 years back.

25 So, it's both the funds that have not yet been

1 paid by the EDA, because they're sitting there right now,
2 and the EDA is waiting to pay them to us. It includes funds
3 that we already were paid, which they'd really, even if they
4 were successful, not have -- just an unsecured claim, I
5 guess. And it also seeks to seek a declaration going
6 forward for claims that aren't yet ripe in 2018, 2019 and so
7 on.

8 THE COURT: Well, that --

9 MR. FRIEDMANN: It's a lot broader than --

10 THE COURT: You're not going to be covering 2019,
11 are you?

12 MR. FRIEDMANN: Are we covering 2019 --

13 THE COURT: I mean --

14 MR. FRIEDMANN: Well, that's why we've moved on a
15 very narrow issue, Your Honor.

16 THE COURT: Right.

17 MR. FRIEDMANN: Which is that right now, there are
18 funds being held by the EDA for 2017, which we want to be
19 turned over. That's the only thing we're moving on right
20 now (indiscernible) has the right.

21 THE COURT: But the abstention is only as to the
22 turnover motion, right? It's not -- the rest of it would be
23 stayed, right?

24 MR. FRIEDMANN: I don't that's accurate. I think
25 that the abstention motion was filed before we even moved

1 for turnover. The --

2 THE COURT: Well --

3 MR. FRIEDMANN: The first filing here was a --

4 THE COURT: Well, let's clarify that. I mean, I
5 understand the point about the money that's sitting with the
6 Town, but I mean, there's... What's the action requesting?

7 MR. GANSBURG: Well, Your Honor -- and you
8 probably saw it in our brief. We offered a compromise on
9 this point. All we need to know is determine whether Sears
10 has complied with the terms of the EDA Act. Has it the
11 4,250 employees, which --

12 THE COURT: Well --

13 MR. GANSBURG: -- picks up the other two issues?
14 And then, which would make sense, when did -- if it didn't
15 comply or fell out of compliance, when did it fall out of
16 compliance? That's it.

17 THE COURT: Well, that's a --

18 MR. GANSBURG: That --

19 THE COURT: That's not...

20 MR. GANSBURG: It seems... The only reason why I
21 added that second part, Your Honor, because it seems
22 efficient.

23 THE COURT: Well --

24 MR. GANSBURG: But if the Court --

25 THE COURT: That's not mandatory of the statute.

1 MR. GANSBURG: Right. Well, it would still fall
2 under the mandatory of the statute, but not withstanding
3 that --

4 THE COURT: It's not efficient because you've been
5 litigating issues that might -- your client might get, you
6 know, five cents on the dollar on -- six years from now.
7 So, it's not efficient.

8 MR. GANSBURG: Well --

9 THE COURT: It would be efficient to decide the
10 core legal issues, which would then be a matter of
11 collateral estoppel on the claim. And of course, then you
12 have the mandatory abstention issue for money that's being
13 held.

14 MR. GANSBURG: And we'll go and look at that, Your
15 Honor.

16 THE COURT: Okay.

17 MR. GANSBURG: And so, just have these matters
18 resolved and then we'll come back to the Court and we can
19 discuss through other pleadings what's the consequences of
20 all that.

21 THE COURT: Okay.

22 MR. FRIEDMANN: All right. So, the second issue
23 that we had discussed was timing, and you asked what, I
24 guess, what they guess is how long it would take? I don't
25 know if anybody knows the answer to that. I started hearing

1 about injunctions and summary judgment motions, and I'm sure
2 that discovery would be taken in advance of all of that.

3 And based on the way in which it's been litigated
4 in this court, I have absolutely no doubt that if we prevail
5 in Illinois, there would then be appeals. So, the notion of
6 30 to 60 days --

7 THE COURT: Well, there'd be appeals --

8 MR. FRIEDMANN: There would be --

9 THE COURT: -- by me too.

10 MR. FRIEDMANN: -- appeals here as well. That's
11 fine. But the notion that Illinois is a place for this can
12 be timely adjudicated, I don't know that there's any basis
13 for that at all, especially --

14 THE COURT: Well, is there a -- do you have anyone
15 to represent to me how long you think it would take in
16 Illinois, including the appellate process?

17 MR. FRIEDMANN: I don't. But the burden is on
18 them to prove to you that in fact it would be timely
19 adjudicated there. What I can --

20 THE COURT: Well, I have an Illinois lawyer
21 telling me, so, you know, I need some response, I think.
22 That's generally how I deal with this is like the lawyers,
23 since it's their area of expertise, they know their court,
24 you know? How long does it take?

25 MR. FRIEDMANN: I know from one colleague who

1 advised me with a matter she had an Cook County that in two
2 years they have not even gotten to summary judgment. So, my
3 guess is that it depends on the type of case, and the nature
4 of the case, and all of that.

5 THE COURT: Okay.

6 MR. FRIEDMANN: But I don't know that I'd be
7 asking this Court to put a lot of weight on either of those
8 predictions in terms of what this will take. I'm just
9 certain that -- whereas what I can predict is that because
10 the motion for turnover is up for an evidentiary hearing
11 today, we can hopefully have that resolved in the next
12 couple of hours, which will be much more efficient and much
13 more quick for the estate, than starting to go in Illinois.

14 THE COURT: It's not teed for an evidentiary
15 hearing today. I have not budgeted time with another 10
16 more items that are contested on the agenda to have an
17 evidentiary hearing today.

18 MR. FRIEDMANN: Okay.

19 THE COURT: Particularly with a motion to strike
20 Mr. Meghji's declaration because he wasn't sufficiently
21 prepared under 30(b)(6).

22 MR. FRIEDMANN: We're happy to address that as
23 well.

24 THE COURT: Okay.

25 MR. FRIEDMANN: The other factor is that I believe

1 Mr. Gansburg said that there's no dispute that this is an
2 issue of state law. And there is a dispute regarding that
3 because it's actually not a state-specific law. It's
4 actually a debtor-specific law.

5 The EDA act -- not the Edge Act, which they kept
6 referring to -- the EDA Act is an act drafted by Sears for
7 Sears. That's it. It only affects Sears. There is no
8 other company who's affected by it. It's not an issue that
9 the Illinois state courts have issued many opinions on over
10 the years. It's never been heard by any court anywhere.
11 And it only affects one party, which is the one that's
12 before your court here as the Debtor.

13 THE COURT: I guess I didn't really understand
14 that argument because even if it were, as you say, a Sears-
15 specific statute, it's still governed by Illinois law.

16 MR. FRIEDMANN: That's correct.

17 THE COURT: And it's not like Sears is not a
18 department of the U.S. that's governed by federal law.
19 We're not in the Court of Claims. But in any event, if we
20 were, it wouldn't be a bankruptcy. It wouldn't be
21 bankruptcy jurisdiction. It would be federal jurisdiction.

22 MR. FRIEDMANN: That's correct, Your Honor.

23 THE COURT: Okay.

24 MR. FRIEDMANN: The point really being that there
25 is no -- there's nothing specific about this act --

1 THE COURT: But that's a point for discretionary
2 abstention, not mandatory abstention, I think.

3 MR. FRIEDMANN: That's correct.

4 THE COURT: Okay.

5 MR. FRIEDMANN: So, also getting back to where we
6 are in the relative cases in terms of timing, so the -- a
7 case was in fact filed on the eve of bankruptcy by the
8 school district, just a couple days later. As of this date,
9 nothing's happened. It hasn't even been -- hasn't been a
10 responsive pleading filed in that case.

11 So, in terms of where the efficiency is and where
12 things are going to happen most quickly, under mandatory
13 abstention, I don't know there is evidence before this Court
14 that it's going to be timely adjudicated in Illinois,
15 certainly compared to -- even if there's no evidentiary
16 hearing today, if there's an evidentiary hearing at the next
17 omnibus hearing, or sometime before then, we've already had
18 documents produced here. We've already responded to
19 interrogatories. There's been depositions of two witnesses
20 in their individual capacity. There's been a 30(b)(6)
21 deposition. There have been discovery disputes.

22 All this stuff would have to happen all over again
23 in Illinois.

24 THE COURT: Why would it? Wouldn't the parties
25 use the same discovery?

1 MR. FRIEDMANN: My understanding is that my --

2 THE COURT: They're nodding yes over there.

3 MR. FRIEDMANN: Well, my understanding is that my
4 friends here have not been very happy with any of the
5 discovery so far here and --

6 THE COURT: Well, that's different issue.

7 MR. FRIEDMANN: -- would start all over again.

8 THE COURT: I mean, they would raise that issue
9 with me too. But --

10 MR. FRIEDMANN: They can, but --

11 THE COURT: -- in terms of the discovery that's
12 actually been had, you would start all over again, right?
13 No. And you should say that louder so the record reflects
14 it.

15 MR. FRIEDMANN: We're not going to waste legal
16 fees repeating ourselves and our school district --

17 THE COURT: Okay. All right.

18 MR. FRIEDMANN: That -- well --

19 THE COURT: And I'm seeing you're raising your
20 rights as to whether it was responsive discovery, but you're
21 not going to start it all over again.

22 MR. FRIEDMANN: We (indiscernible). Your Honor,
23 we'll move to permissive abstention as well. And I don't
24 know if I'm addressing --

25 THE COURT: No, I just want to focus on mandatory

1 --

2 MR. FRIEDMANN: Okay, sure.

3 THE COURT: -- at this point.

4 MR. FRIEDMANN: Yeah, I think from our perspective
5 is there's nothing there we've required -- unless they have
6 put in front of you evidence that this is going to proceed
7 more efficiently in Illinois, which they have not, other
8 than --

9 THE COURT: I don't think that's the standard. It
10 says timely adjudicated. Now, I do take into account the
11 pressures in the particular bankruptcy case. But -- and I
12 can always revisit it. I mean, I can estimate the -- there
13 are things I could do in this case if it turns out that the
14 Illinois court, for whatever reason, just sits on this.

15 MR. FRIEDMANN: The issue we have --

16 THE COURT: But it's --

17 MR. FRIEDMANN: -- is that right now there are
18 about \$9.6 million sitting in an account with the Village
19 that should have been paid out to us --

20 THE COURT: Well, can I --

21 MR. FRIEDMANN: -- by the end of 2018.

22 THE COURT: Could I stop you on that point?

23 MR. FRIEDMANN: Yeah.

24 THE COURT: Is that \$9.6, is that -- would that
25 all go to this school district?

1 MR. FRIEDMANN: Not -- no, absolutely not. It's -
2 -

3 THE COURT: Well, why doesn't -- they're the only
4 ones who raised this issue. Why doesn't the rest of it go
5 out?

6 MR. FRIEDMANN: I don't think anybody else wants
7 to raise the arguments that they raised because there is no
8 merit to them.

9 THE COURT: Then I don't understand why the rest
10 of it doesn't go out.

11 MR. FRIEDMANN: Oh, no, it's -- let me back up.
12 We were before Your Honor back in February, I believe, when
13 there was 100 percent of the EDA fund was there. Sixty-five
14 percent of it goes to Sears -- I'm messing the numbers up --
15 55 percent goes to Sears, 45 percent goes to a bunch of
16 other municipalities, including the school district.

17 THE COURT: Right.

18 MR. FRIEDMANN: At Your Honor's -- I don't want to
19 say insistence, but suggestion, we went back afterwards and
20 reached a stipulation so that the children that we heard
21 about who need security and the budget that (indiscernible)
22 would not be held up by this dispute, and we stipulated to
23 the distribution of that 45 percent to the municipality,
24 including the school. They've had that money since, I
25 believe, January.

1 The only portion of the EDA funds we're talking
2 about right now are the 55 percent that are earmarked for
3 Sears.

4 THE COURT: Okay. I don't think my question was
5 clear. That money you say should go to Sears, as I read the
6 statute there is more than one -- if it doesn't go to Sears,
7 there's more than one recipient of it. My question is -- I
8 gathered from the answer I got that 65 percent of that would
9 go to this school district, or approximately that amount.
10 The rest should go to Sears. No one else is asking for
11 that, right?

12 MR. FRIEDMANN: I think that's probably right,
13 Your Honor.

14 THE COURT: So, that should happen. I don't see
15 why it shouldn't. I don't understand why that doesn't
16 happen. The school district. It's not fighting for anyone
17 else. It's just the school district.

18 MR. FRIEDMANN: We made that offer
19 (indiscernible).

20 THE COURT: So, that should definitely happen.

21 MR. FRIEDMANN: And Your Honor, I'm reminded by my
22 colleague that the Village actually does have an attorney
23 here today, the Village, on behalf of the Village. So, in
24 terms of why things have or not have happened by the
25 Village, I probably should not be responding on their

1 behalf. And if you have questions --

2 THE COURT: Okay. Well --

3 MR. FRIEDMANN: -- it would probably make sense
4 for them to respond to those.

5 THE COURT: All right. Well, maybe they want to
6 just see who else got involved. But at this point, no one
7 else has gotten involved. So, it seems to me the rest of
8 the money, the money that's not... I mean, before I deal
9 with anything else, the rest of the money that's not,
10 depending on your point of view, going to go to the Village
11 -- I'm sorry -- going to go the school district, should be
12 paid by the Village or the Town to Sears. Which is --

13 MR. FRIEDMANN: Agreed.

14 THE COURT: -- I think, 35 percent, or roughly.

15 MR. SCHEIN: Your Honor, Michael Schein, Vedder
16 Price, on behalf of the Village of Hoffman Estates. One
17 clarification there. The way the statute works, if any
18 portion of the 55 percent is recaptured, that money -- the
19 money that doesn't go (indiscernible) -- of that 55 percent,
20 the way the recapture works is the Village would share in
21 some of the money that didn't otherwise go on that 55
22 percent, whereas the Village gets none of the 45 percent
23 under the statute.

24 So, the question becomes, assuming the parties can
25 all agree on what that number is, as long as we get an order

1 that's clear as to where that money goes, the Village will--

2 THE COURT: So, the Village is --

3 MR. SCHEIN: -- take the Court's direction.

4 THE COURT: -- reserving its rights to share
5 something?

6 MR. SCHEIN: Well, we would have -- that's the way
7 the statute's written. So, we have to follow the statutes.

8 THE COURT: I didn't really see that, but okay.

9 MR. SCHEIN: That's how it works, because the
10 statute, if you look at 4(g)4(a) --

11 THE COURT: How do you determine that? The
12 Village has some sort of percentage of the --

13 MR. SCHEIN: Yeah --

14 THE COURT: school district

15 MR. SCHEIN: Well, if you look at 4(g)4(a),
16 besides the 55 and 45 percent, there's another \$5 million
17 that goes off the top and it comes to the Village. And then
18 there's a bucket for costs. So, the 40 --

19 THE COURT: Is that we're talking about bucket?

20 MR. SCHEIN: No, we're not. But what happens is
21 the way the statute's written, if any of the Sears money is
22 recaptured, as the district's arguing, then Sears at that --
23 I'm sorry -- then the Village at that point shares. I don't
24 know offhand what that calculation is. I just want the
25 Court to be clear about that.

1 THE COURT: Okay. Well, you could make that
2 calculation, though, right?

3 MR. SCHEIN: Yes. We could do it all, as long as
4 we get a direction from this Court to do so, we will do it.

5 THE COURT: All right. Well, I think you should
6 do that.

7 MR. SCHEIN: We will, Your Honor.

8 THE COURT: Obviously, if there's a dispute about
9 it, I'll hear it. But I mean, no one else is interested in
10 this except you two, the school district and the Village.

11 MR. SCHEIN: Correct, Your Honor. Actually, this
12 dispute is with them. We at the Village are just waiting
13 for your Judge to direct this.

14 THE COURT: Well, no, you just told me that you
15 want some of it.

16 MR. SCHEIN: Well, all we're saying is at some
17 point, some of it may come back. It's not a question of
18 want. It's what the statute says.

19 THE COURT: Well, but no one else has asked for
20 it.

21 MR. SCHEIN: Correct.

22 THE COURT: You're asking for it.

23 MR. SCHEIN: I'm just reserving -- I'm just
24 clarifying on the record that to the extent --

25 THE COURT: Okay.

1 MR. SCHEIN: -- we are entitled to a piece of it,
2 I want the Court aware of that. That's all.

3 THE COURT: All right. So your rights are
4 preserved. You're reserving your rights. But I really
5 believe that the remaining money should go to Sears.

6 MR. SCHEIN: And Your Honor...

7 THE COURT: So can we pre-- I don't want to focus
8 on permissive extension for the moment -- abstention for the
9 moment. I want to focus on mandatory. What -- I didn't, as
10 you can tell, I didn't accept the argument that this is a
11 Sears specific statute and therefore it's somehow core,
12 right? I don't really accept the notion that turnover is
13 core unless, again, it's a no brainer.

14 MR. FRIEDMANN: Well, that adds, I think -- that's
15 our other point, though, Your Honor, is I think it is a no-
16 brainer. I think that you've got a lot of very -- they've
17 got a wonderful team here who've come up with some really
18 creative arguments, none of it is really supported, though,
19 by the statute. So the Recapture Provision 4.5 it just
20 simply says that if we don't have the 4,250 employees during
21 the relevant year that -- it doesn't say that -- what that
22 relevant year is. It doesn't say that it's the year in
23 which the taxes were levied versus the year in which the
24 taxes were paid. That's something that they have read into
25 it, because it would be better for them if it was the year

1 in which the taxes were paid because then it -- we wouldn't
2 be eligible for it quite yet.

3 THE COURT: Well, why aren't you also reading into
4 it?

5 MR. FRIEDMANN: What we're doing is we are
6 treating it the same way it's been treated year, after year,
7 after year by the Village and Sears with nobody ever raising
8 an issue. So every year, what happens is the taxes are
9 levied and, you know, so in this instance they were levied
10 in 2017, those taxes -- and they're paid in arrears. So in
11 the early part and middle part of 2018 they're paid for 2017
12 and typically by December. And in the record we've got --
13 showing both in the last two years this has happened, so by
14 December of 2018 there would have been a board meeting and
15 resolution of the Village to make that payment and
16 distribute that payment.

17 So what does that tell us about what year is
18 relevant? Well, if the Recapture Provision allows you to
19 withhold payments in any month in which we were not in
20 compliance, if they're meeting in December 2018 regarding
21 2017, they can make a decision about every month in 2017.
22 What they can't do in December of 2018 is make a decision
23 about every month in 2018, and that's the way it's worked
24 every single year going back as far as we've seen records
25 for. Is that it's that following year after collecting the

1 funds, they go back and say, was Sears in compliance? They
2 were, then the Village authorizes the payment to be made,
3 often enough in that same year, in that same year which the
4 taxes were collected, the taxes are reimbursement is paid,
5 so the course of dealing between the parties.

6 We also, again, we have Mr. Schein here from the
7 Village who can confirm our understanding and the
8 understanding between the only two parties to this
9 agreement, which are Sears and the Village. And the Village
10 does not disagree with any -- I mean, the Village, as you
11 saw, did not file any kind of objection to our motion to
12 turn over funds that they're holding, even though, frankly
13 if we're wrong it's to the Village's benefit because that
14 money goes, amongst all the municipalities, they're one of
15 them. But they didn't file any response because they would
16 have been saying something that's not accurate.

17 They don't challenge our compliance in 2017. They
18 don't challenge that 2017 is the right year to be looking at
19 for these funds, the year in which the taxes were levied.
20 They don't challenge that the way in which the employees
21 were counted was appropriate, which employees in terms of
22 what --

23 THE COURT: Well, you say "they" you're referring
24 to the Village?

25 MR. FRIEDMANN: The Villages.

1 THE COURT: Right.

2 MR. FRIEDMANN: Excuse me. Sorry. To be more
3 specific.

4 So I don't think there really is a genuine dispute
5 here at all. You have an opportunistic school district who,
6 in addition to getting the 45 percent we already agreed to
7 make sure that that was distributed to them and was not held
8 up by their own litigation, they have that money, now
9 they're looking for, as Your Honor put it, a windfall. This
10 is above and beyond what they could have reasonable have
11 expected to get when they put their budget together, and
12 they're taking a shot at it. And, you know they're lawyers
13 and that's the way lawyers make money, so I get it. But
14 there really is no legitimate basis in the case law, other
15 than their creative lawyering.

16 Let me address one final thing on that is, you
17 know, they suggest that the record is not clear and Mr.
18 Meghji's deposition, he wasn't prepared for. This is the
19 reality of being in bankruptcy, Your Honor, is that all the
20 employees who worked there in 2017 unfortunately are no
21 longer all employed by Sears. So the two women who were
22 responsible for contemporaneously keeping track, on a
23 monthly basis, of our compliance with the EDA Act are not
24 there anymore. Luckily all of their documents and records
25 are, so Mr. Meghji, as CFO -- CRO of the company, excuse me,

1 gathered all those documents, went through them and was able
2 to see that consistent with what Sears confirmed to the
3 Village, in real-time, it was in compliance in every month
4 in 2017.

5 So what has been produced and what Mr. Meghji was
6 able to testify is the best available evidence and it's
7 un rebutted. There's not -- it's not as those there's some
8 email that says, oh no, we're really not in compliance, what
9 are we going to do. There, by the way, certain are email
10 that say, we better we careful, we're learning -- we're
11 losing a lot of employees, we've got to track this carefully
12 because in the future we may not be in compliance. But
13 there is no evidence whatsoever suggesting that at any point
14 in 2017 they were not in compliance.

15 And really, at the end of the day, it's a counting
16 exercise. This is not a complicated issue. You count from
17 1 to 4,250 and when you hit that number you can stop because
18 you're in compliance. You certify that to the Village and
19 the Village turns over the money.

20 THE COURT: And that's with actual Sears
21 employees, not third parties?

22 MR. FRIEDMANN: So, it depends on the timing. So
23 in 2017, certainly the beginning of 2017, they were relying
24 solely on Sears employees at the Hoffman Estates campus.
25 And the numbers were significantly above 4,250 so as long as

1 they knew -- and then the actual number didn't matter, they
2 didn't have to certify that to the Village, they had to
3 certify that we are above the number. So there were enough
4 employees, full-time employees at Sears at the time, they
5 were fine. As the year went on and as they started getting
6 closer to that number, they started including, and there's
7 nothing in the EDA Act that prevents them from doing so,
8 they included other full-time employees that were also at
9 the Hoffman Estates campus, and that includes the --

10 THE COURT: Employees of Sears?

11 MR. FRIEDMANN: They're not employees of Sears,
12 they're employees who work at the EDA.

13 THE COURT: All right.

14 MR. FRIEDMANN: Which again, the -- there was
15 discussion about the Edge Act and the EDA Act --

16 THE COURT: And this was in 2017?

17 MR. FRIEDMANN: This was for 2017. So in 2012 it
18 wasn't just -- the EDA Act and the Edge Act were both
19 amended. Same piece of legislation, amended them both. In
20 the Edge Act the language was they required Sears to "employ
21 a minimum of 4,250 full-time employees at its corporate
22 headquarters in Illinois at the time of the application."
23 Employ. In the EDA Act, amended at the same time, same
24 legislation, uses very different language it says, "Sears is
25 required to maintain 4,250 jobs," they don't have that same

1 language "employed" because there never was an understanding
2 or a requirement that Sears employ all those people. The
3 idea was Sears came out of the Hoffman Estates, which at the
4 time was Prairieland, put \$100 million or so into that area
5 and now they're being reimbursed for that. Not just because
6 it created Sears jobs, but it created jobs for probably a
7 lot of the parents of the kids that lived in -- live in the
8 Hoffman Estates area, whether or not they work for Sears or
9 work for some other company that, you know, was spurned by
10 the fact that Sears had moved there.

11 So there is not that requirement. And once again,
12 as the Village can confirm, there's no dispute, as between
13 Sears and the Village, that it's not limited to just Sears
14 employees. In fact, it's not only limited to Hoffman
15 Estates. You could count employees in the entire EDA, and
16 Sears never did that, because it wasn't necessary. Once
17 they got to 4,250 they stopped counting. If it was
18 necessary to count through the entire EDA, they could have
19 done that they would have been even that much more over the
20 threshold.

21 But our view, Your Honor, is that there's no real
22 bona fide dispute here because neither the statute has the
23 language that the school district wishes it had, and in
24 terms of the numbers, they're there, they are what they are.
25 And it was counted contemporaneously, they're in business

1 records and it -- and Sears --

2 THE COURT: Well, the numbers for the Sears
3 employees.

4 MR. FRIEDMANN: Well, the numbers are in there for
5 both Sears employees and they also kept track of the non-
6 Sears employees. They're all working at the Hoffman Estate
7 campus, so all these employees had to get registered badges
8 through the, what was it, real estate office, at Hoffman
9 Estates. So Sears actually was able to easily keep track of
10 every -- all of the employees at the building, not just
11 Sears.

12 THE COURT: What about the school district's
13 argument that it shouldn't count part-time employees?

14 MR. FRIEDMANN: They did not count part-time
15 employees. That's actually -- the documents that were
16 produced reflect they were only counting full-time
17 employees. Now, by the way, I know the Village takes the
18 position that part-time employees could have been counted,
19 there's nothing that restricts Sears from doing so under the
20 EDA. Because they were using information from the Edge Act
21 that they had already collected, which had more restrictions
22 on it, they limited themselves to only counting full-time
23 employees. And the materials, the term "scrub" that was
24 used before, that was one of the things that was done, is
25 they would scrub it to make sure that they were only

1 including full-time employees.

2 THE COURT: Okay.

3 MR. FRIEDMANN: Thank you, Your Honor.

4 MR. GENSBURG: Your Honor, may I address just a
5 couple matter? I think this dialogue that I -- we've had
6 sort of establishes that this is simply not a statute that's
7 going to need clarity, as I said earlier.

8 But I want to point out a couple things. First of
9 all, Mr. Friedmann mentions past practices. You might
10 recall we had sent a letter to the Court about our ability
11 to get documentation from prior years and they objected
12 saying that 2017 was the only year that's relevant. And now
13 he's arguing about years' prior past practices. We've never
14 been given those documents, we've asked for that stuff,
15 haven't been given it and so I don't think it's appropriate
16 that he makes that argument right now.

17 He makes a point about how the Village's silence
18 is somehow acquiescence. I'm not sure how you read that
19 into it. You know, we've been active on this, and the
20 Village has been watching us and they know what's going on.
21 So their silence may be, you know, guys go for it, we're
22 supporting you. I don't know what it is. Or it could be
23 the fact that the Village gets -- as long as the EDA Act
24 remains in effect gets \$5 million. And then once the Act
25 disappears, because it's noncompliant, that \$5 million goes

1 away. So it could be one of those two things, or maybe it's
2 a third, I don't know.

3 THE COURT: Where does it go?

4 MR. GENSBURG: It goes to the other taxing
5 districts. The \$5 million is their take under the EDA Act
6 while its in place. And that's -- you know, if you were a
7 cynic you would say, well, that's why the Village is not
8 doing anything about this. Or maybe they're looking at me
9 and saying, go for it, Gensburg. I don't know. But I think
10 the mere fact that they're silent is not necessarily
11 acquiescence and agreement.

12 Mr. Friedmann says that there's a -- that there
13 was -- there's no --

14 THE COURT: Well, there's no -- isn't there -- I
15 mean, Sears had to certify compliance, there's no document
16 where they accept certification?

17 MR. GENSBURG: Sears -- when you -- in actually
18 attaching some of the documents Sears sends a certification
19 letter that basically says, we've complied.

20 THE COURT: Okay.

21 MR. GENSBURG: And the Village says, great. The
22 Village doesn't say, well, give the detail about how you
23 complied.

24 THE COURT: But is -- I guess my point is, isn't
25 saying, great, enough to mean that they've agreed?

1 MR. GENSBURG: I don't -- yeah, I don't think --
2 you know, the problem with those letters is the years. So
3 Sears -- the Village was saying, give us data in 2017 for
4 2017, 2018 for 2018 and so there's that discrepancy. But I
5 think, quite frankly, Your Honor, that the Village would be
6 thrilled to allow the EDA Act to remain in place because
7 they make money off of it. And that's the \$5 million. I
8 don't know if that's what Michael Schein was talking about,
9 but that's the \$5 million. Once the Act disappears, that \$5
10 million goes to all the taxing districts, it's not funds
11 that are just to the Village, which is a product of the
12 statute that Mr. Florey or Mr. Atkinson can walk the Court
13 through, if you want a little more detail on that.

14 And the problem with the 30(b)(6), you know, he
15 says, Mr. Meghji, all the employees are gone. Well, you
16 know, 30(b)(6) is hard, it requires you to inform yourself.
17 And when you look at the case law that deals with 30(b)(6),
18 you can call them employees or nonemployees, you just have
19 to inform yourself. And most of these employees are at
20 least employees under the agreement. I'm not sure why this
21 is so difficult. But the bottom line is, just saying there
22 was a methodology, and I can't tell you what it is, doesn't
23 inform me. I have no idea how you determine that the people
24 at Sbarro's who make the pizza for lunch are full-time
25 employees.

1 The other problem is, is that when you look at the
2 documentation that was provided in his declaration, Your
3 Honor, they refer to active badges for the Sears employees.
4 But there's also a column that says "daily swipes of
5 associates," which is employees. It's half that number. So
6 there's active badges of 4,300 and the daily swipes are
7 2,100. And we asked him about that and he says, I don't
8 know, I didn't look at that.

9 The fact that there's a lot of active badges and
10 the company is shrinking dramatically doesn't necessarily
11 mean there's 4,300 full-time equivalent employees, the point
12 being there's a lot at issue here that needs to be resolved.
13 This is not a frivolous dispute, by any stretch of the
14 imagination.

15 THE COURT: Let me ask your colleague, we talked
16 about, at the trial level -- at the appellate level, what is
17 your sense of getting -- let's assume there is contested, up
18 to at least the intermediate appellate court, what would
19 that time take?

20 MAN 1: Well, there's also an expedited proceeding
21 in the appellate court as well.

22 THE COURT: Right. But can you just give me a
23 ball park sense?

24 MAN 1: Again, an election case is probably the
25 best example where there's a critical need to get the answer

1 quickly, and it can be done in less than four months. You
2 have an expedited briefing schedule, you have an expedited
3 hearing schedule. Most appellate courts don't take oral
4 argument, they just render the decision. And if the
5 direction was clear from this Court to be on -- you simply
6 have to request to be on the expedited calendar.

7 THE COURT: And that applies to matters like this?

8 MAN 1: If --

9 THE COURT: If the parties --

10 MAN 1: -- we will inform --

11 THE COURT: -- request it?

12 MAN 1: Not just the parties but this Court.

13 They're going to understand that this -- there's a need for
14 expedited action so that we don't hold up any element of the
15 bankruptcy case. That alone is enough to get the trial
16 court to expedite this to get the appellate court to
17 expedite it.

18 THE COURT: Okay.

19 MAN 1: Thank you.

20 THE COURT: All right.

21 MR. FLOREY: Your Honor, I just want to clarify a
22 few statements made on the record that the district raised.

23 First and foremost, the Village's responsibility
24 is to comply with the statute, and what's most important is
25 the district noted in its papers, the statute does not give

1 the Village any audit or certification rights. So the
2 Village is not with the power to go ahead and verify. It
3 has no authority to go ahead and verify. Prior to 2018 no
4 one disputed Sears' letters, Sears' statements, all the
5 Village did, in good faith, was, are you in compliance and
6 Sears said yes and we distributed the monies as the statute
7 directs us to do. It is only just before this case and in
8 2018 that the district, or any party, let alone this
9 district, any district has disputed.

10 As a result, the bankruptcy happened, we are
11 stayed. We came to this Court with the parties to
12 distribute the 45 percent that no one had an issue, and
13 we're here today asking this Court to make a determination,
14 or if it's going to be the state court, whoever it is, just
15 to tell us what to do with the money. It is not for us to
16 make that interpretation. You, or another judge, are
17 wearing the robes, its not for the Village.

18 As for a conflict of interest, which we take
19 personally, if any of this 55 percent comes back, it
20 actually goes to the Village. So the Village would get a
21 piece of that, but right now we don't, so saying that we're
22 in favor of the Debtors or not in favor of the Debtors, it
23 would show that we, the Village, would not -- supporting the
24 Debtors, which we're not taking a position one way or
25 another, that's why our silence is here, Your Honor.

1 And finally, the EDA Act, as we understand it,
2 just doesn't go away. What they're fighting over now is
3 4.5(b) which is the statute within a section of the EDA Act
4 dealing with Recapture. The EDA Act is still in effect,
5 we're still required to comply. There is also an EDA
6 agreement, Your Honor, and really what that agreement was is
7 when this project was developed that was the basis to fund
8 the project, with -- most of it was funded by Sears. And
9 what is being paid now is not really a subsidy, it's a
10 reimbursement of the advancement of the costs to Sears, that
11 is what the statute and the agreement is.

12 We also, probably, Your Honor, to give you a
13 heads-up, may very well be back before you at some point for
14 this year, depending how this Court or any other court
15 rules, because we have the issue of the EDA agreement is up
16 for assignment to the buyer, Transform Holdco. So we're
17 only dealing with 2017 levy and the money we're holding. We
18 are collecting and will be collecting from the Cook County
19 Treasurer this coming year's tax revenues from 2018 taxy
20 levy. So we may eventually face this issue again. I just
21 want to let the Court know that.

22 THE COURT: Okay. All right. Okay. I have
23 before me a motion of Community Unit School District 300 for
24 a relief from the automatic stay, or in the alternative, for
25 abstention.

1 The motion was actually filed before there was
2 anything really, I think, to abstain from, although since
3 then the Debtors have filed, and this is on for today's
4 calendar as well, a motion for turnover of property that the
5 Debtors contend is its property that's currently being held
6 by the Village party to the EDA Agreement, the Village of
7 Hoffman Estates. And I'm applying the abstention piece of
8 the motion to that turnover motion, i.e. that it is the
9 turnover motion that I am being asked to abstain from.

10 The motion seeks abstention on both a permissive
11 and a mandatory basis. 28 USC Section 1334(c)(2) provides
12 for a mandatory abstention. "Upon timely motion of a party
13 in a proceeding based upon a state law claim or state law
14 cause of action, related to a case under Title 11, but not
15 arising under Title 11 or arising in a case under Title 11,
16 with respect to which an action could not have been
17 commenced in a court of the United States absent
18 jurisdiction under this section." The section referring,
19 generally, to Section 1334, which pertains to jurisdiction
20 of bankruptcy cases and proceedings.

21 Under those circumstances, continuing on with the
22 statute, "The district court shall abstain from hearing such
23 proceeding if an action is commenced and can be timely
24 adjudicated in a state forum of appropriate jurisdiction."
25 Under the general order of reference the issues before me is

1 to the district court.

2 Accordingly, Section 1334(c)(2) requires, requires
3 that is, abstention where the motion to abstain is timely
4 filed, the underlying proceeding is based on a state law
5 claim or cause of action, there's a lack of a federal
6 jurisdictional basis, absent bankruptcy, the action is
7 commenced in a state forum of appropriate jurisdiction, the
8 abstention will result in a timely adjudication and the
9 proceeding is noncore for purposes of 28 USC 157(b), in that
10 it would not arise under, or arise in -- arise under Title
11 11, or arise in a Title 11 bankruptcy case. See *In Re:*
12 *WorldCom, Inc. Securities Litigation*, 293 B.R. 308, 331
13 (S.D.N.Y. 2003).

14 Regarding the timely adjudication -- or subject to
15 timely adjudication requirement, there appears to be no
16 definitive standard for judging whether an action is capable
17 of timely adjudication. However, it is reasonably clear
18 that the cases that address the issue focus on the needs of
19 the Chapter 11 case and not an absolute time frame. See
20 Paragraph 3.05, *Collier*, 16th Edition, 2019, i.e., the Court
21 should not simply look at an objective argument as to
22 whether courts in the nonbankruptcy forum adjudicate their
23 cases within a certain time frame, but rather how the time
24 frame in which they adjudicate those cases relates to any
25 urgent needs of their particular Chapter 11 case where the

1 bankruptcy court -- over which the bankruptcy court is
2 presiding.

3 The only basis for bankruptcy jurisdiction here
4 that is not related to jurisdiction, but rather core
5 jurisdiction, is the Debtor's argument that the money at
6 issue, which is being held by the Village of Hoffman
7 Estates, is clearly property of the Debtor's estate and
8 therefore must be turned over, under Section 542 of the
9 Bankruptcy Code, and that the movant school districts
10 attempt to prevent that turnover is a violation of the
11 automatic stay under Section 362(a).

12 That would clearly serve as a basis for defeating
13 the mandatory requirement under Section 1334(c)(2) if the
14 issue, indeed, were clear. I conclude, however, based on
15 the record before me, that the issues underlying the dispute
16 as to the reallocation of the funds at issue under Section 4
17 of the EDA, is not clear and would require adjudication on
18 issues that cannot be decided on a clear basis.

19 The Debtor relies heavily on the fact that the
20 recipient of the funds and the entity to whom the Debtor's
21 compliance with the EDA and its requirement that a certain
22 level of jobs be maintained for the year at issue has
23 accepted that certification. However, it is not clear to me
24 that that acceptance, which in fact is not an agreement, but
25 merely a lack of, at this point objection, qualifies as a

1 binding determination or waiver that would control here over
2 the interests of the school district, which is a residual
3 beneficiary, if in fact Sears failed to maintain 4,250 jobs
4 at the EDA for the year in question, 2017.

5 The school district argues, to the contrary, that
6 the Debtor is using figures from the wrong year, which is
7 not specified in the actual statute. And secondly, to the
8 extent its relying upon figures that include jobs that are
9 not jobs of direct Sears employees, the statute is not clear
10 on its face that that is the right method for calculation.

11 I believe that under the case law, considering 542
12 as a basis for core jurisdiction in the mandatory abstention
13 context, a Debtor needs to show more than that it has a good
14 shot at winning, or is likely to win. Rather, it needs to
15 show whether there's a bona fide basis or it is clear that
16 the Debtor will prevail. And I did not believe that the
17 Debtor's pleadings to date rise to that level of assurance
18 or lead me to rise to that level of assurance.

19 That leaves the issue, which I believe the Movant,
20 as with all of the factors in Section 1334(c)(2) as to carry
21 the burden of proof that the right to the funds being held
22 by the Village can be adjudicated on a timely basis by the
23 State Court. When I consider timeliness here, I'm very much
24 motivated by the concern that the Sears Debtors are on a
25 fairly thin margin as to the ability to pay administrative

1 expenses and, therefore, also, on a fine margin in their
2 ability without the consent of administrative expense
3 creditors to confirm with chapter 11 plan. It's important
4 for the debtors to proceed promptly to confirm a plan which
5 requires them to determine their sources and uses of cash as
6 a condition precedent to that. The Debtors have targeted an
7 outside date to do that, of July of this year, which to me
8 does not reflect wishful thinking, but rather is important
9 to do. And I believe that the money at stake here, several
10 million dollars, is an important component of that analysis.

11 So, timely adjudication, I review in that context.
12 I have been told by an active member of the Illinois Bar who
13 practices in this area, that with proper guidance from the
14 parties as well as this Court, the Illinois Trial Court, as
15 well as the Appellate Courts, would likely treat this matter
16 on an expedited basis. Counsel for the movants has
17 represented to me that under those circumstances he believes
18 there would be a final ruling on the merits of the issues
19 before me, which I briefly summarized, and which are well
20 set forth on the record within approximately 60 days of my
21 ruling on abstention, and that there is an expedited
22 procedure for appeal as well.

23 The Movants have also represented to me that they
24 would act to expedite the process and not to delay it,
25 including, for example, using discovery that has already

1 been produced in seeking expedited treatment. Based on
2 those representations I conclude that the matter can be
3 timely adjudicated, although I reserve my right to
4 reconsider my decision if it turns out to the contrary, that
5 the timeline for adjudication is not a matter of several
6 weeks, but rather several months or longer. But based upon
7 the record before me, I will abstain under Section
8 1334(c)(2). I believe there are at least colorable issues
9 going to the merits here, based on, A, the choice of year
10 for the certification and, B -- although this may never be
11 relevant, depending on the answer to issue number A, or
12 issue A, whether the statute permits the developer to
13 include in its calculations of jobs maintained, jobs of
14 workers who are not direct employees of Sears, and the
15 evidence to support that. But I believe that given those
16 colorable issues I'm required to have the State Court decide
17 those issues, again, on the conditions that the Movants have
18 agreed to on an expedited basis.

19 So, I'll ask the Movants to submit an order to
20 that effect and you don't need to formally settle that
21 order, but you should provide a copy in advance to counsel
22 for the Debtors so they can be sure it's consistent with my
23 ruling.

24 I'm not deciding today whether the stay was
25 violated. That's really an issue that will come up at the

1 end of the day. But I'm obviously permitting the underlying
2 facts to be decided by the State Court.

3 MR. FRIEDMANN: Your Honor, just a point of
4 clarification. With respect to the 40 percent that is not
5 issue, should that same order be addressing that? Do you
6 want a separate -- I know it's important to the Village to
7 have something?

8 THE COURT: No, I think there should be a separate
9 order. It's really a separate issue. I don't want to have
10 that hold up this. I just think it should proceed promptly.
11 And I also want to make it clear that what I'm abstaining on
12 is the turnover motion. The litigation should not delve
13 into the State Court litigation and decide the merits of the
14 claims that have been filed in this case for reallocation
15 for prior years, or for the future. I'm hopeful that there
16 may be clarification, based on the State Court's decision,
17 that will inform those issues on a collateral estoppel
18 basis, but the only thing that's going to the State Court is
19 the particular issue of the right to the money that's being
20 held, that would otherwise go to the school district itself,
21 by the Village.

22 MR. FRIEDMANN: And Judge, you asked earlier about
23 how do we figure out how much goes back to the other taxing
24 districts, all of a certain percent.

25 THE COURT: Right.

1 MR. FRIEDMANN: It's very easy mathematics if you
2 figure out what goes.

3 THE COURT: So, the only issue is what part the
4 Village keeps on account of your piece.

5 MR. FRIEDMANN: Whether they keep it or their
6 silence gives it to Sears.

7 MR. FLOREY: Yes, Your Honor, just for
8 clarification, we'll work with both of them. They'll do the
9 calculation the Village technically has to go through a
10 finance committee and a board committee process which we'll
11 expedite to get that completed and submit an order.

12 THE COURT: And if Sears disputes what should be
13 retained by the Village at all, I just suggest that you guys
14 leave that issue open.

15 MR. FLOREY: Thank you, Your Honor.

16 MR. FRIEDMANN: Your Honor, on the motion to
17 strike, I guess that --

18 THE COURT: It's irrelevant. It's moot.

19 MR. FRIEDMANN: Withdraw without prejudice.

20 THE COURT: Because it's not my issues.

21 MR. FRIEDMANN: Right. Thank you, Judge.

22 THE COURT: In other words, I decided this issue
23 without my consideration of Mr. (indiscernible) declaration
24 one way or the other. Okay.

25 MS. MARCUS: Good afternoon, Your Honor,

1 Jacqueline Marcus, Weil Gotshal & Manges on behalf of Sears
2 Holding Corporation, its affiliates. The next item on the
3 agenda, I believe is number five. It's the motion of the
4 Trustees of the Estate of Bernice Pauahi Bishop to compel
5 payment. As indicated on the agenda, that matter has been
6 adjourned, but Mr. LeHane would like to address the Court.

7 THE COURT: Okay. This is the Hawaiian store.

8 MR. LEHANE: That's correct, Your Honor. Robert
9 LeHane, Kelley Drye and Warren, on behalf of the Trustees of
10 the Estate of Bernice Pauahi Bishop, which does business as
11 the Kamehameha Schools. As Your Honor may recall, this
12 estate really is a school system. Ms. Bishop left all of
13 her estate to the children of Hawaii. There is a
14 significant shortfall in the rent. The rent increased in
15 July of 2018 by fourfold. And the Debtor has been paying
16 approximately 26 percent. As of April 1st, the total
17 shortfall is \$1.646 million. We agreed, at the last
18 hearing, at the request of Transform and the Debtor to
19 adjourn the matter. The Debtor did agree, in connection
20 with that adjournment, to put \$500,000 into escrow as
21 adequate protection for the rent shortfall, and we very much
22 appreciate that.

23 They, again, asked for an adjournment of this
24 hearing because, at the time they made the requests, they
25 still were not sure the treatment of the lease.

1 Subsequently, we were informed by Transform, as was the
2 Debtor that they were going to reject the lease, that the
3 store will be closing.

4 We're in the process of negotiating with Transform
5 what we believe may be a short-term lease that will allow
6 for that to be a more orderly process than closing the store
7 by the deadline to assume or reject on May 15. The Debtor
8 has agreed to add another \$250,000 to the escrow and we
9 appreciate that. That is a percentage of what would be
10 allocated to the Debtor's share of the time during which
11 they've been in the premise. From and after the closing,
12 really is the obligation of Transform and we would reserve
13 the right depending on how discussions go during the next
14 several weeks, to seek further adequate assurance from
15 Transform, which would be related to the time that they've
16 been in the premises, and base rent and tax obligations that
17 have come due since then.

18 THE COURT: Under the APA, in essence.

19 MR. LEHANE: Yeah, under the APA, that's correct,
20 Your Honor. And what we've also discussed is we're
21 adjourning this to June 20, but with the understanding that
22 we really will try to resolve this. If the parties are
23 unable to make significant progress in the next several
24 weeks, we will be submitting a scheduling order for the May
25 21, and use that as a status conference.

1 THE COURT: Okay.

2 MR. LEHANE: So, that if we have to come back here
3 before Your Honor, we would like that to be an evidentiary
4 hearing. In fact, we have folks from Hawaii ready to come
5 out for today. I obviously don't want to make that trip,
6 frankly, if we don't have to, or more than once, Your Honor.
7 So, that's essentially the update. Sorry to hear that this
8 store is going to be closing much sooner than we thought it
9 would, but we hope we can resolve this. To date, we've
10 heard no real substantive response to the issues that I
11 think were raised in our original motion. So, we thank you
12 for that, Your Honor.

13 THE COURT: Okay. Very well. Thanks.

14 MS. MARCUS: I'm glad we've picked up the pace a
15 little bit. The next item, Your Honor, is the motion of
16 Dedeaux Inland Empire Properties to compel the debtor in
17 possession to assume and assign or alternatively to reject.
18 It's Item Number Six on the agenda.

19 MR. FENNELL: Good afternoon, Your Honor, William
20 Fennell on behalf of Dedeaux and on the Empire's. Your
21 Honor, I believe that we have accomplished what they sought
22 to accomplish, which is communication with both Transform
23 Co. and the Debtor. Literally at the 11th hour last night,
24 we had a conference call and I was informed that the Debtor
25 had been informed formally that Transform Co. will seek to

1 assume its contract and, therefore, I understand that one of
2 the parties for the Debtor or for Transform Co. is willing
3 to put that on the record today. It doesn't resolve the
4 cure issue items and we're hopeful that those could be done
5 promptly and in conjunction with the master services
6 agreement for the facility, but that would be left for
7 another day.

8 THE COURT: All right. So, it is on the, it's now
9 on the assigned list.

10 MS. MARCUS: Your Honor, I believe it was on
11 Friday but it may have been on Thursday of last week, before
12 the designation rights period, and with respect to this
13 lease. We did get the notice from Transform that they are
14 designating this lease for assumption. We have not yet
15 formally -- we've kind of shared the work between transform
16 and the Debtors in terms of filing the notices with the
17 Court. And I believe that Transform's counsel is going to
18 actually file the formal notice.

19 THE COURT: So, this motion is really moot then.

20 MS. MARCUS: From our perspective it is, Your
21 Honor.

22 THE COURT: I mean, I'm not sure I would have
23 granted it, given the statute, but it's moot.

24 MS. MARCUS: I was going to make the argument, but
25 given the time, I'm not going there, Your Honor. Thank you.

1 THE COURT: Okay, very well.

2 MR. FENNELL: Is there somebody from Transform who
3 can confirm.

4 THE COURT: The counsel is here. They're not
5 disputing what you say.

6 MR. FENNELL: Your Honor, I will have to confirm
7 with their office. I'm sure, I mean we're working very
8 closely with Weil on this one but --

9 THE COURT: I accept the Debtor's representation.

10 MR. FENNELL: I do too.

11 THE COURT: They're aware of the whole process
12 here.

13 MR. FENNELL: Understood, Your Honor, but that
14 wasn't completely transparent to us, but we understand from
15 last evening and today's representations. Thank you.

16 THE COURT: Okay, very well.

17 MS. MARCUS: The next one, Your Honor, number
18 seven, is the motion of Maudlin At Butler LLC for payment of
19 administrative expenses, and their counsel will handle that.

20 THE COURT: Right.

21 MR. GOODHOUSE: Good afternoon, Your Honor.
22 Brendan Goodhouse, Cutty & Feder for Maudlin At Butler, the
23 landlord. This motion is for the payment of property taxes
24 that came due in November of 2018.

25 THE COURT: Well --

1 MR. GOODHOUSE: When --

2 THE COURT: I'm sorry, go ahead.

3 MR. GOODHOUSE: Sure. I just wanted -- some
4 housekeeping -- it's in the papers, but just so we're all on
5 the same page. When we first made a motion, the claim was
6 for \$88,660.08. Subsequently, we learned that the Debtor
7 had made a partial payment of those taxes in the amount of
8 roughly \$19,000. So, the amount outstanding is \$69,713.54.

9 THE COURT: And the Debtor contends that that
10 payment is in respect of the pro-rated post-petition
11 portion?

12 MR. GOODHOUSE: Yeah. Essentially, so, what the
13 dispute comes down to is, the Debtor's position, and
14 obviously they can state it better than I will, but that the
15 roughly \$70,000 that's unpaid is not properly categorized as
16 administrative expense. It should be considered a
17 prepetition claim because it's applicable to the earlier
18 part of 2018.

19 THE COURT: The taxes themselves accrued pre-
20 petition?

21 MR. GOODHOUSE: The taxes -- yes, that's right.
22 So, what we really come down to is just, I think, it's a
23 statutory interpretation argument. And the key provision is
24 section 635(d)(3) of the code.

25 THE COURT: Three sixty-five.

1 MR. GOODHOUSE: What did I say? Sorry about that.

2 THE COURT: You transposed a couple of numbers, no
3 problem, 365(d)(3).

4 MR. GOODHOUSE: My temporary dyslexia; apologies.
5 It requires timely performance of obligations of the Debtor
6 arising from and after the order for relief under any
7 unexpired lease of nonresidential real property until such
8 lease is assumed or rejected. Not many courts have actually
9 directly addressed this question here, where what you have
10 is property taxes that aren't billed until the end of the
11 year, which is what the case is in South Carolina, at least
12 in Greenville County, South Carolina, where what you have a
13 lease obligation that comes up following the petition. But
14 the tax period covers both prepetition and post-petition
15 periods. The question really boils down to, do you read
16 Section 365(d)(3) and give a plain meaning to those words,
17 or do you find that there's ambiguity in there, and starts
18 taking to account certain policy considerations that may
19 adjust how you're going to read this. And you have
20 different -- different Courts have come to different
21 conclusions on this issue.

22 Now, the Debtor's notes the In re Child World
23 case, which found, as they would like Your Honor to hold
24 here, that the portion of the taxes applicable to the
25 prepetition period would not fall under 365(d)(3). But then

1 about three months after that case came down, the In re RH
2 Macy case came down where Judge Sotomayor looked directly at
3 the Child World case, considered it and, I think in sum and
4 substance, that ruling came out to be -- I understand the
5 policy considerations being discussed in the Child World
6 matter. I'm not going to read ambiguity into words of the
7 statute where I see none. And it's really, you know, it's
8 the same thing, and I took note of it when you were issuing
9 the decision on the first motion here, in discussing the
10 rules and interpretation of contracts. And it's really no
11 different with statutory language. Yes, you have to
12 consider overall policy objectives, and you have to consider
13 the totality of the statute. But that doesn't override the
14 actual words. And just because two parties had different
15 understandings of their meanings, doesn't mean there's
16 ambiguity there.

17 Now, I think, frankly, what seems to me at least
18 to be the critical decision here is the term 'arise.' Does
19 the obligation arise prepetition as the taxes are accruing
20 or does the obligation arise post-petition when the county
21 says the taxes are due, and then when they're due under the
22 lease? And I think the plain English meaning of that is, it
23 doesn't arise until the county says it's due, and it doesn't
24 arise under the lease until the payment is due. So, here,
25 the contrary example, or the example is, if Mauldin had,

1 some time in 2018, gone to K-Mart and said, "We want you --
2 , " for whatever reason, because they knew the bankruptcy was
3 brewing but that's really irrelevant; if they said, "We want
4 you to make a payment on your 2018 taxes," K-Mart would have
5 properly said, "No, we have no obligation to do that." That
6 obligation doesn't arise under the lease until the county
7 bills them. So, it's -- and the other --

8 THE COURT: Of course, that's what Judge Posner
9 had a real problem with. He said it didn't make any sense,
10 that very fact (indiscernible), and that's why he said in
11 Handy Andy that this can't be what --

12 MR. GOODHOUSE: In Handy Andy, yes, I understand -
13 -

14 THE COURT: -- this can't be what Congress meant.

15 MR. GOODHOUSE: And the Third Circuit has gone
16 other way on it. So, both parties in their briefing,
17 obviously, focused on this jurisdiction.

18 THE COURT: So, you have some real heavyweights
19 talking here, right?

20 MR. GOODHOUSE: So, you do --

21 THE COURT: Posner, Sotomayor.

22 MR. GOODHOUSE: -- certainly above my pay grade.
23 And the last thing --

24 THE COURT: Right. But actually, she recognized
25 too that it was kind of the logical ... But I don't think

1 anyone argued to her that the statute may have been just a
2 timing issue; not the timing of accrual versus arise, but
3 the fact that you actually have to pay.

4 MR. GOODHOUSE: I think, in that case, Judge,
5 actually, the parties' argument seemed to focus more on the
6 term 'obligation' than 'arise.' I found that in looking at
7 some of the subsequent cases 'arise' struck me as being the
8 key issue here. But one thing I would note about the policy
9 --

10 THE COURT: But I think that the point is -- and
11 actually, I think Judge -- I think it was Judge Sweet,
12 another heavyweight, in the Loews case, talks about -- yeah,
13 it was Judge Sweet -- talks about the focus of the statute
14 being on immediate payment, not so much on the world
15 'arising' and he distinguished the situation in Lowe's from
16 the situation where taxes would be accruing over time, even
17 if they're payable as of one date. So, I'm going to cut
18 this short. You want to brief this very well. This is an
19 issue that is clearly not decided in the Second Circuit yet,
20 and I believe it can go either way. And my view is that
21 this should be pro-rated here, that the full tax bill isn't
22 required to be paid under 365(d)(3). And I think that's the
23 majority view of the cases, generally. I wouldn't limit it
24 just to tax bills. I think you have to look at things that
25 accrue over time. And you're absolutely right, there are

1 circuits that go the other way. In fact, even though the
2 majority of courts apply the accrual analysis, the majority
3 of the circuit courts go the other way. But I think Judge
4 Posner actually does a really good job of analyzing it in
5 Handy Andy Improvement Centers 144 F.3rd, 1125 Seventh
6 Circuit 1998. And I do think it depends a lot on the
7 particular obligation, but I think with accruing taxes,
8 which is what Handy Andy covers, and of course with Child
9 World and Macy's did too, on contrary District Court
10 opinions, the better view would that Congress was trying to
11 do a lot of things in 365(d)(3), but the main ... but I
12 don't think it was intended, and I don't think the language
13 requires that tax bills that accrue over the length of the
14 prepetition period, as well as carrying over the post-
15 petition period have to be paid under 365(d)(3). And I
16 think the Urban Realtek Properties versus Loews Cineplex
17 Entertainment Corp case 2002 US District LEXUS 6186, April
18 9, 2002, goes into this in some detail at pages 18 -- I'm
19 sorry, 17 through 24, where Judge Sweet recognizes it's
20 appropriate to pro-rate in some cases, particularly taxes,
21 but not in that case where there was one overall payment.

22 I recognize that CenterPoint Properties, In re
23 Montgomery Ward, goes the other way; 268 F.3rd 205 Third
24 Circuit 2001, as well as, of course, the Macy's case. But I
25 think the majority of the cases doesn't, as discussed, for

1 example, in In re Rothman 2007 Bankruptcy LEXUS 2651,
2 Bankruptcy EDNY August 2, 2007. And also note that, for
3 what it's worth, the ABI Commission on reforming the
4 Bankruptcy Code sided with the pro-rating courts as to how
5 the landlord's claim against the estate should be treated.
6 See First Glance: Legislative Update ABI Commission,
7 Creating More Certainty in Chapter 11 for All Parties, 34-4
8 ABI Journal 12, April 2015. The recommendation is actually
9 at the very end of that article. So, I just think that the
10 statute is sufficiently ambiguous to look at the overall
11 bankruptcy policy. This is a lease that was rejected
12 ultimately, right?

13 MR. GOODHOUSE: Yes.

14 THE COURT: So, we look at 502(g) and 365(g), and
15 I'm going to deny your motion.

16 MS. MARCUS: Number Eight on the agenda is
17 actually one of the Debtor's motions. It's the motion of
18 the Debtors for entry of an order authorizing and approving
19 procedures for settling de minimis affirmative claims and
20 causes of action of the Debtors.

21 Basically, Your Honor, what we've proposed is a
22 procedure that would expedite the Debtor's ability to enter
23 into those kinds of settlements. We have discussed it and
24 actually run the procedures by the Creditors Committee. The
25 Creditors Committee made comments. We responded to the

1 comments and those comments are reflected in the proposed
2 procedures. Essentially, we're seeking authority to settle
3 claims that have a settlement amount of less than \$5
4 million.

5 We received only one objection to the motion.
6 That was the objection of Wilmington Trust, the successor
7 indentured trustee, with respect to the 2010 notes.
8 Wilmington asserts two objections. First, that the Debtors
9 have not provided any evidence of how many de minimis claims
10 may exist and may be resolved before plan confirmation.
11 Given the size of the Debtors' estates and the compressed
12 period in which these cases have taken place, I don't
13 believe there's anyone who can guess as to how many claims
14 there would be. Frankly, I don't know that I have one that
15 I can think of today, but we do think it would be in the
16 Debtor's estates and it would also assist the Court if we
17 were to approve these procedures. There's no downside to
18 doing it, so if there were five or if they were 100, I don't
19 think that would make a difference.

20 The second objection asserted by Wilmington is
21 that given the replacement liens that they were granted
22 under the final DIP order, they should not be excluded from
23 the opportunity to review and object to the proposed
24 settlements. Again, we're talking about the settlements
25 that are under \$5 million. On this, Your Honor --

1 THE COURT: I'm sorry, say that again, a
2 settlement ...?

3 MS. MARCUS: Settlements that are less than \$5
4 million, because settlements that have an amount more than
5 \$5 million would be subject to the normal noticing
6 procedures. I think in the last line of their objection,
7 Wilmington says, "Include us as a noticed party on those de
8 minimis settlements." The Debtors' perspective is that we
9 leave it to Your Honor. I think every time we add another
10 notice party on these kinds of matters, we're increasing the
11 cost and the delay and the hassle, frankly, of getting this
12 stuff done.

13 THE COURT: Although I think they're right -- I
14 mean, they're the fulcrum security, arguably, so I would
15 include them in indentured trustee. You don't have to give
16 it to every bond holder, it's just the indentured -- the
17 collateral agent and indentured trustee.

18 MS. MARCUS: Okay.

19 THE COURT: On the first point, these are -- it
20 doesn't say what you settled them for, right, it just says
21 settlement?

22 MS. MARCUS: It says settlement amount.

23 THE COURT: The settlement amount.

24 MS. MARCUS: So, if the claim is one where the
25 other party -- and we didn't seek authority to actually make

1 payments on any claims because these are affirmative claims
2 that belong to the estate. So, if the amount that the
3 estate is going to get is less than \$5 million, then we
4 don't need to -- we only notice the US Trustee, the
5 Creditors Committee and Wilmington Trust.

6 THE COURT: Okay. All right, Mr. Fox, you have
7 anything to say on this one?

8 MR. FOX: No, Your Honor.

9 THE COURT: Since you were on the second part.

10 MR. FOX: Yes. So, I don't have any -- we made a
11 motion as the collateral agent as well, which was for the
12 entire --

13 THE COURT: That's right. I keep saying -- it's
14 in both capacities.

15 MR. FOX: Yes, thank you, Your Honor.

16 THE COURT: Five million dollars is a lot of
17 money, obviously. There needs to be some review as this
18 motion provided for. And I think that the motion itself was
19 properly noticed under the case management order. The only
20 party that objected was the second lien trustee and
21 collateral agent. I take that very clearly to mean that
22 other parties of interest are comfortable with this
23 procedure. But I believe given the position of the second
24 lien debt in the capital structure that it should be also a
25 notice party. And with that change I'll grant the motion.

1 MS. MARCUS: Okay, Your Honor, we'll revise the
2 order and submit it to chambers with a copy to Mr. Fox in
3 advance.

4 THE COURT: Okay.

5 MS. MARCUS: The next item on the agenda is the
6 motion of Winners Industry.

7 MR. SMITH: Good afternoon, Your Honor, James
8 Smith from McKool Smith on behalf of Industry Co. Winners
9 originally moved for motion to grant administrative expense
10 priority for the goods that Winners sold to Debtors that
11 were received by the Debtors post-petition. Debtors oppose
12 this motion, arguing that the relevant date with which to
13 assess when the transaction occurred isn't the date the
14 goods were received, but is rather the date the goods were
15 shipped, which is pre-petition. So, Debtors are arguing
16 that because the goods were shipped pre-petition, the whole
17 transaction is a pre-petition transaction and doesn't fall
18 within the ambit of 503 --

19 THE COURT: But since then, they've argued that
20 you should just follow the order that covers all of these
21 types of claims, procedurally.

22 MR. SMITH: Our position is, we are urging Court
23 to adopt a reasoning of the Third Circuit in the In re World
24 Import case.

25 THE COURT: There's a ... maybe I'm confusing

1 this. Isn't there now a procedural order for dealing with
2 all of these types of claims?

3 MR. SMITH: There's a procedural order for
4 503(b)(9) claims which are not at issue today, and we agree
5 with them that those are subject to that order and those
6 will be raised at the appropriate time. With regard to the
7 503(b)(1) claims, there is an order on those procedures,
8 this specific motion, and this specific circumstance, in
9 which we're asking for a ruling on a very discreet legal
10 issue, was carved out of that order. And we informed
11 Debtors of this last Tuesday.

12 THE COURT: I'm not prepared to rule on this.
13 It's now 3:30. I've been in court, basically, 12 hours a
14 day since Monday. You're going to have to come back.

15 MR. SMITH: Thank you, Your Honor.

16 THE COURT: I'm sorry. You had to wait several
17 hours but this is just not acceptable to me.

18 MR. SMITH: Thank you, Your Honor.

19 MS. MARCUS: The next matters, Your Honor, we
20 categorized as automatic stay matters.

21 MS. PESHKO: Your Honor, the first of these
22 matters is the motion of Mario Aliano for relief from a
23 stay. I'm no sure whether counsel is in the courtroom.

24 MS. HARRIS: Good afternoon, Your Honor. This is
25 Sharon Harris. I'm on telephonically from Chicago.

1 THE COURT: Good afternoon.

2 MS. HARRIS: Good afternoon. I represent Movant
3 Mario Aliano. And this is motion to lift the stay in the
4 civil litigation. All that's remaining in his case is on
5 appeal. Just real briefly, the Circuit Court of Cook County
6 Illinois entered a judgment against Sears for violation of
7 the Illinois Consumer Fraud Act, and that was affirmed on
8 appeal by the Illinois Appellate Court in 2015. And the
9 matter was remanded on issue of attorneys' fees. There was
10 a three-day evidentiary hearing and the Court awarded
11 \$267,470 in attorneys fees. Sears appealed the Circuit
12 Court's award of the fees and Sears also (indiscernible) and
13 obtained an approval of an appeal bond. The appeal bond
14 covers the award plus one year of statutory interest.

15 THE COURT: But does it --

16 MS. HARRIS: So, the only thing --

17 THE COURT: I'm sorry. Does it actually cover the
18 fees? I thought that was the issue.

19 MS. HARRIS: Debtors have raised the issue of the
20 defense cost. The appeal has been fully briefed for several
21 months, and all that's awaiting is the decisions by the
22 Illinois Appellate Court. Debtors raise that there could be
23 some cost involved in arguing the matter on appeal, but
24 there's no guarantee that the Appellate Court would set the
25 matter for oral argument. It's within the Court's

1 discretion as to whether to set it for oral arguments. And
2 we're willing to waive our request for oral argument on the
3 appeal in order for the matter to go forward. And even if
4 here is oral argument, I think the cost to Debtors of
5 defending that would really be minimal because, as I said,
6 the matter has been fully briefed and it's just a matter of
7 whether the Court, Illinois Appellate Court orders there to
8 be oral argument in matter.

9 THE COURT: Okay.

10 MS. HARRIS: We've cited some cases in our brief
11 that the causative defending litigation by itself is not
12 necessarily enough to preclude relief from an automatic
13 stay.

14 THE COURT: Okay. Let me hear from the Debtor's
15 counsel.

16 MS. PESHKO: Your Honor, for the record, Olga
17 Peshko, Weil Gotshal for the Debtors. This particular
18 appeals bond is fully collateralized by Sears prepetition,
19 Your Honor, in the amount of over \$290,000. The Debtors
20 have an interest in this money and they're not willing to
21 waive their right to argue oral argument or to prepare for
22 that. And there's a cost associated with that. If the
23 Debtors do succeed at the appeal, then the matter may be
24 remanded, there may be other further proceedings. And so,
25 our view is that there's cause to keep the automatic stay in

1 place. Furthermore, Your Honor, there is no insurance
2 available for the incident date related to this action to
3 cover the Debtors' defense costs.

4 THE COURT: So, the appeal bond is collateralized,
5 it's not paid for, it's collateralized.

6 MS. PESHKO: That's right.

7 THE COURT: So, it's not like insurance.

8 MS. HARRIS: Your Honor, if it makes a difference,
9 we are willing -- the appeal ban covers the award plus one-
10 year statutory interest. We're willing to waive recovery
11 for attorneys' fees of any amount above and beyond the
12 appeal bond amount.

13 MS. PESHKO: With respect, that does not account
14 for the Debtors having to expend defense defend costs now.

15 THE COURT: Okay, but that does take care of the -
16 - I mean, the only issue that's on appeal is he defense
17 cost, right? So, they're not going against the appeal bond
18 for that?

19 MS. PESHKO: The issue on appeal are attorney fees
20 for the --

21 THE COURT: The attorneys' fees.

22 MS. PESHKO: Exactly.

23 THE COURT: So, maybe I misunderstood counsel. I
24 thought she was saying that they were not going to look to
25 the appeal bond for the attorneys' fees.

1 MS. PESHKO: I think == I don't want to put words
2 in her mouth but -=

3 MS. HARRIS: No, that's not what I meant, Your
4 Honor. What I'm trying to say is the only issue that's on
5 appeal is the amount of attorneys' fees and the appeal bond
6 covers the amount that the Circuit Court awarded plus one
7 year's statutory interest.

8 THE COURT: So, that would include --

9 MS. HARRIS: So, it's been beyond --

10 THE COURT: So, that would include the attorneys'
11 fees. The appeal bond includes the attorneys' fees.

12 MS. HARRIS: Yes.

13 THE COURT: So, what were you saying, that you
14 would waive? I thought I heard you say you would waive some
15 --

16 MS. HARRIS: The statutory interest beyond one
17 year.

18 MS. PESHKO: The appeals bond doesn't cover that.

19 THE COURT: Okay. So, we're not relating
20 anything. All right. Well ... How would the Debtors
21 propose this get resolved otherwise, if I didn't lift the
22 stay?

23 MR. FAIL: Your Honor, Garrett Fail, Weil Gotshal
24 & Manges for the Debtors as well. Your Honor, this is one
25 of a large number of pending litigations that will have to

1 be resolved post confirmation pursuant to a plan, whether
2 part of a liquidated trust or whatever structure is proposed
3 in that plan with the moneys available in judgments about
4 what's worth pursuing at that point. At this point, though,
5 with cash limited and a desire to protect the assets, the
6 Debtors chose to oppose the motion to preserve the stay and
7 status quo for an additional period which, for the cases to
8 continue.

9 THE COURT: So then, on the phone, do you have a
10 slot that you would lose with the Illinois Appellate Court
11 if I denied your motion for a stay of relief? In other
12 words, let's say I adjourned it until a date that I believe
13 would be a reasonable date for a plan to be confirmed, so
14 that will be post-confirmation, some time in August or
15 September. There will be a determination whether to go and
16 liquidate the claim at that point. Other than the delay, do
17 you lose anything else, the delay between now and September?

18 MS. HARRIS: Well, I would say that the Appellate
19 Court had the brief, fully-briefed, last August, I believe.
20 So, in that respect they didn't get the suggestion of
21 bankruptcy until October, and so we kind of lost our place
22 in line with the Appellate Court deciding that, because they
23 stayed the matter rather than ruling on the brief or
24 ordering oral arguments.

25 THE COURT: So, it's still locked in place based

1 on the automatic stay.

2 MS. HARRIS: Right. I would just say we got the
3 judgment against Sears and December 2015 it was affirmed, so
4 we've been waiting all this time for the attorneys' fee.

5 THE COURT: Well, you're going to be waiting
6 longer because it's -- the fees aren't covered anyway. So,
7 this is a fairly close call under (indiscernible) but I will
8 determine to adjourn the motion. I'm not going to require
9 you to refile it, but I'm going to adjourn it because I
10 believe the Debtors have a reasonable basis to win the
11 motion, but that's only for a relatively brief period until
12 the Debtors confirm a plan or something else dramatic
13 happens in the case. So, you'll have to refile it. But you
14 should get an adjourn date for the omnibus hearing in
15 August.

16 MS. HARRIS: Thank you, Your Honor. Okay.

17 THE COURT: Okay. It's just I don't think that
18 the result -- this is just liquidating a claim, except to
19 the extent that you would get paid by the bond, but that
20 hits the Debtor. It's not the equivalent of having an
21 insurance policy that's already been paid for. So, the
22 impact is significant and the reason to do it now as opposed
23 to a few months from now is not dramatic enough to warrant
24 lifting the stay, because it's a prepetition claim. So,
25 I'll ask the Debtors to submit an order that adjourns the

1 motion, making the finding that I need to make under 362(e).

2 MS. PESHKO: Thank you, Your Honor, we will. The
3 next item on the agenda is the motion of Steven Tuttle for
4 relief from the stay. Your Honor, I wanted to note that the
5 counsel that filed this motion has withdrawn as attorney for
6 this party, so we don't know whether anyone is appearing on
7 behalf of Mr. Tuttle.

8 THE COURT: Okay. Is anyone here or on the phone
9 appearing on behalf of Steven Tuttle on this lift stay
10 motion to pursue litigation in respect of a prepetition
11 claim?

12 MS. PESHKO: Your Honor, I wanted to also note
13 that while we file this objection to reserve our rights,
14 because we don't have any insurance available of our own, we
15 did confirm that a third-party insurer for the employer of
16 Mr. Tuttle at the time of the incident is paying defense
17 costs for Innoval, the debtor in this instance. However,
18 after counsel withdrew we reached out to get contact
19 information for his former client and he has not agreed to
20 provide us with a phone number or email. So, we've been
21 trying to reach out to reach a stipulation and we'd like to
22 just adjourn without a date, to be able to get in touch with
23 this party.

24 THE COURT: Okay, that's fine. We should provide
25 the same type of order that I just directed in the last

1 matter. Have you communicated to former counsel that you've
2 discovered this insurance at Innovel?

3 MS. PESHKO: That's what they've argued in their
4 motion.

5 THE COURT: No, I thought you said -- no, I'm not
6 talking about Sears. I thought you said there's a third
7 party that as insurance, the actual employer of this
8 individual.

9 MS. PESHKO: We haven't reached out to the
10 employer, Your Honor.

11 THE COURT: No, no, I said, have you reached out
12 to Mr. Tuttle's former counsel to let former counsel know
13 that you've located this third-party insurance?

14 MS. PESHKO: That's right. That's who we reached
15 out to try to negotiate a stipulation.

16 THE COURT: All right, so you told her that?

17 MS. PESHKO: Right.

18 THE COURT: All right. Because I was going to
19 direct you to do that if you haven't, but you've already
20 done it.

21 MS. PESHKO: We did it. We did that too, and
22 tried to get the contact information afterwards.

23 THE COURT: Okay. All right, that's fine. So,
24 you can just submit the adjournment order on that one.

25 MS. PESHKO: Will do.

1 THE COURT: It's likely that I would have denied
2 the motion subject to a step dealing with going against the
3 third-party insurance.

4 MS. PESHKO: Thank you, Your Honor. The next item
5 is the motion of Jeffrey Pfeiffer to lift the stay. I'm not
6 sure whether someone is here --

7 THE COURT: This is Mr. Pfeiffer's motion?

8 MR. GALLAGHER: Yes. Good afternoon, Your Honor,
9 Dave Gallagher on behalf of Mr. Pfeiffer.

10 THE COURT: Right, good afternoon.

11 MR. GALLAGHER: Your Honor, if you'd like brief
12 argument I would just state this is a motion to lift the
13 stay with regards to a pre-suit action in Illinois that we
14 filed in the Circuit Court of Cook County against K-Marts as
15 well as a co-defendant, Monsanto, with regards to cancer
16 that my client developed after use of Roundup. As the
17 Court's aware of the (indiscernible) factors, the big issue
18 with regards to the Defendant's objection -- the Debtor's
19 objection -- is that of insurance coverage. The period of
20 time with which Mr. Pfeiffer claims he purchased this
21 Roundup spans from 1988 until 2014. The Debtor's counsel,
22 their objection notes that their records with regards to
23 coverage only go back to 2005. They do provide exhibits to
24 their spots, which indicate that coverage is exhausted for
25 multiple years. However, they did not provide any

1 explanation for coverage for the period of 2008 to 2009,
2 which leaves me to believe that there was, in fact, coverage
3 available for that time period. Their coverage does provide
4 (indiscernible) defense for the case. The Claimant here
5 simply seeks to move forward their claim. We believe
6 there's available insurance coverage which would include the
7 cost of defense and, in exchange, the Debtors would get
8 complete relief from the claim other than whatever is
9 available, and insurance proceeds. We believe it to be in
10 the benefit of the Debtors and it would expediate the
11 resolution of this claim.

12 THE COURT: I'm sorry, I missed the last sentence.
13 I couldn't follow what you were saying. Can you --?

14 MR. GALLAGHER: Sure. It would be to the benefit
15 of the Debtors, it would expediate the resolution of this
16 claim.

17 THE COURT: It's a prepetition unsecured claim to
18 the extent it's not been discharged in K-Mart's bankruptcy.
19 If there is available insurance, I'm sure the Debtors would
20 lift the, agree to lift the stay to let you go against the
21 insurance. They're saying there isn't available insurance.
22 You're saying that they haven't shown you that fact for 2008
23 through 2009? Okay.

24 MR. GALLAGHER: That's correct.

25 MS. PESHKO: Your Honor, that's correct. We have

1 not provided a certificate of exhaustion for that period.
2 The Debtors believe there is no -- the insurance has been
3 exhausted for that period. However, we are trying to obtain
4 a copy from the insurer. We informed counsel that we would
5 like an adjournment to be able to get information, also to
6 confirm the discharge issue and counsel has not agreed to
7 adjourn.

8 THE COURT: Do you have any problem lifting the
9 stay solely as to 2008 and '09, to the extent that there is
10 insurance and that the Claimant waives any other claim
11 against K-Mart?

12 MS. PESHKO: If we can confirm that there is
13 insurance we'll do that --

14 THE COURT: If part of the stip stays this waives
15 a claim against the Debtors, except to the extent of any
16 available insurance policy and we make no representation
17 that there is one, is there any issue there?

18 MS. PESHKO: We would be willing to do that
19 except, Your Honor, that Sears would be required to defend
20 itself. I mean, K-Mart would be required to defend itself
21 in this action. Or we could try to provide first a
22 statement from the insurer that it's not there so that we
23 don't have to proceed with the stipulation?

24 THE COURT: Well, what efforts are you making to
25 determine that?

1 MS. PESHKO: We have reached out to the Debtors
2 and we're trying to work with them to get this letter of
3 exhaustion. It's just, we're just looking for additional
4 time to do that, Your Honor.

5 MR. GALLAGHER: Your Honor, if I may, the issue
6 for me is one of statute of limitations on my claims. These
7 claims are going to be going forward on a discovery basis.
8 I'm not sure of your familiarity with the Roundup
9 litigation, but this has really started to be a public --

10 THE COURT: Well, it can certainly wait a month or
11 two, I'm assuming, right?

12 MR. GALLAGHER: In theory, maybe. It's going to
13 depend on what the parties respond as far as their response
14 to the pleading filed in the State Court. But my client
15 could suffer prejudice in the loss of his ability to bring
16 these claims if we delay this inadvertently.

17 THE COURT: Well, there's nothing in the motion
18 about whether he learned about Roundup, right? And
19 apparently, he was buying it until 2014.

20 MR. GALLAGHER: That's correct. That's when he
21 was diagnosed.

22 THE COURT: He was diagnosed in 2014?

23 MR. GALLAGHER: That's correct.

24 THE COURT: Okay. So, what is the statute of
25 limitations for this type of claim in Illinois?

1 MR. GALLAGHER: It is two years from when you knew
2 or should have known of the harm and the potential cause.
3 So, the literature regarding the AML, my client's form of
4 leukemia, and his exposure to Roundup really started coming
5 out in 2017. There's a critical article that was published
6 on November 9, 2017 that I would argue would be the point at
7 which he knew or should have known of the association
8 between AML and Roundup.

9 THE COURT: Okay. Adjourning this to the June
10 omnibus day doesn't seem to affect the statute of
11 limitations. And I thought you already commenced this
12 lawsuit. You didn't? You haven't yet? All right.

13 MR. GALLAGHER: I have not yet. I was aware of
14 the stay once I got --

15 THE COURT: All right. Have you filed a claim in
16 this case?

17 MR. GALLAGHER: I did.

18 THE COURT: All right, so that's enough. You've
19 asserted the claim. So, I'm going to adjourn this for two
20 months so the Debtors can see whether it's worthwhile to
21 enter into the type of stipulation that I mentioned for
22 2008, 2009.

23 MS. PESHKO: Thank you, Your Honor.

24 MR. GALLAGHER: Thank you, Your Honor.

25 MS. PESHKO: That was the last matter on the

1 agenda today.

2 THE COURT: Okay, very well.

3 MAN 1: Thank you very much for your
4 (indiscernible) today --

5 THE COURT: I'm really impressed by those who
6 stayed for the whole thing.

7 (Whereupon these proceedings were concluded at
8 3:41 PM)

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I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde

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Date: April 25, 2019

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